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JUDGE SOPHIA ADINYIRA, PRESIDING.

1. The United Nations Appeals Tribunal (Appeals Tribunal) has before it an appeal against Order No. 062 (NBI/2014) and Judgment No. UNDT/2014/092, issued by the United Nations Dispute Tribunal (UNDT or Dispute Tribunal) in Nairobi on 28 March 2014 and 1 July 2014, respectively, in the matter of *Birya v. Secretary-General of the United Nations*. On 2 September 2014, the Secretary-General filed his appeal, and Mr. George Robert Birya filed his answer on 4 October 2014.

Facts and Procedure

2. In August 2010, Mr. Birya joined the Department of Safety and Security at the United Nations Office in Nairobi (DSS/UNON) as a Security Officer.

3. From October 2012 to January 2013, some individuals who were not part of the United Nations alleged that Mr. Birya owed them money, had issued fraudulent cheques and had stolen car parts. Some of the complainants reported those disputes to the Kenyan police who, in turn, approached DSS/UNON at their premises in person in late-January 2013, where they encountered Mr. Birya's Second Reporting Officer (SRO). In an attempt to resolve the matter, Mr. Birya's SRO invited the complainants and a Constable from the Kenyan police into her office to discuss the complaint. In the following days, Mr. Birya's SRO also raised the matter with Mr. Birya directly and meetings were subsequently arranged with, inter alia, the Assistant Chief of Security and the Constable, with a view to resolving the complainants' dispute with Mr. Birya.

4. In this period, the relations between Mr. Birya and his SRO deteriorated such that on 18 February 2013, Mr. Birya filed a complaint of harassment and abuse of authority against his SRO, the Assistant Chief of Security and another DSS officer. Mr. Birya contested the manner in which they had intervened in, and sought to handle, his private dispute, including inter alia, by meeting and seeking to mediate with members of the Kenyan police at UNON premises, seeking to withdraw his firearm, and preventing him from going on mission to Dadaab (Harassment Complaint).

5. Sometime in March 2013, upon the direction of UNON's Chief of Security, the Special Investigation Unit (SIU) commenced an internal investigation into Mr. Birya's Harassment Complaint.

6. On 13 March 2013, Mr. Biryá wrote to the UNON Director-General indicating that he still awaited a response to his Harassment Complaint. He also pointed out that the SIU officer investigating his Harassment Complaint had a conflict of interest as he was deputy to one of the

in two offences but that previous efforts to summon him had been unsuccessful, the letter requested the Chief Security Officer of the United Nations in Nairobi to “instruct him to appear before the [Officer Commanding Station in] Gigiri for further action”.

12. Mr. Birya went to Gigiri police station on the same day. He was charged and finger printed, and a bond was set. He was released on the condition that he would appear in court one week later.

13. On 22 August 2013, Mr. Birya wrote to the UNON Director-General complaining, inter alia, that DSS/UNON had requested the Kenyan police to demand that he be handed over for questioning and arrest thereby trying to force him to drop his Harassment Complaint. He asked for protection.

14. While there is confusion as to the precise date that was set for Mr. Birya to appear in the Magistrate’s Court, it is not disputed that when he failed to appear, the Magistrate issued a warrant for Mr. Birya’s arrest.

15. On 4 September 2013, the UNON Director-General was informed that an arrest warrant had been issued against Mr. Birya and wrote to the Office of Legal Affairs (OLA) for advice as to the implications for the immunities of the Organisation.

16. On 9 September 2013, the UNON Director-General responded to Mr. Birya that in view of his “repeatedly stated concerns about the integrity of DSS”, she had decided to establish a fact-finding panel to examine his Harassment Complaint. She also noted that an arrest warrant had been issued for him and that he had been summoned to appear on 30 August 2013.

17. On 11 September 2013, OLA informed the UNON Director-General that since the alleged actions that were the subject of the criminal charges against Mr. Birya did not relate to his official functions, he did not benefit from immunity from suit.

18. On 11 September 2013, the UNON Director-General constituted a fact-finding panel and

apply. As such, Mr. Birya's challenge would not be receivable because he failed to seek management evaluation of the decision of May 2013 to refer his complaint to OIOS within 60 days.

27. Should the Appeals Tribunal consider that Mr. Birya's challenge to the correctness of the referral of his Harassment Complaint was receivable, the UNDT erred in fact in concluding that the seven-month delay in addressing Mr. Birya's Harassment Complaint was unjustified in view of the complexities, developments in the case t

35. The UNDT equally did not err in concluding that the delay was unjustified given that the reasons raised by the Secretary-General were not beyond the Administration's control. Further, the absence of either the UNON Director-General or the Legal Adviser cannot paralyze the functioning of the office as someone must have been appointed Officer-in-Charge to address such important matters. Moreover, the Secretary-General's explanation for the delay, namely that it would be hard to find trained staff members to sit on the panel, was inconsistent with the facts of the case which showed that a panel was constituted within two days of the decision of the UNON Director-General to establish a fact-finding panel.

36. The UNDT correctly found that DSS/UNON attempted to coerce Mr. Birya to retract his complaint and its finding was based on extensive witness and documentary evidence. The Secretary-General's appeal is an attempt to have a *de novo* hearing, which the Appeals Tribunal has ruled on numerous occasions is not its function, and a great degree of deference is owed to the UNDT on findings of fact where oral evidence was heard.

37. The Secretary-General's claim that the UNDT exceeded its jurisdiction in considering or making findings in relation to the events of 21 August 2013 is unfounded. The UNDT did no more than consider the facts which were directly related to Mr. Birya's claim, and which were properly raised in his management evaluation request and UNDT application, namely that the UNON management improperly sought to use the Gigiri police to resolve his Harassment Complaint. While the fact-finding panel examined the same facts with the purpose of concluding whether it amounted to harassment or abuse of authority, the UNDT only examined the events of 21 August 2013 with the sole propose of determining whether resorting to the involvement of national police was lawful, or based on extraneous reasons including personal animosity.

38. The UNDT did not exceed its jurisdiction by referring to ST/AI/299 given that Mr. Birya's complaint unequivocally stated that the Administration violated his rights by involving the national police. The Dispute Tribunal simply identified the legal rules that applied to the factual allegations he raised. Although he had not personally cited this administrative instruction in his management evaluation request or UNDT application, a staff member is not obliged to identify every statutory and jurisprudential rule that applies and it is within the prerogative and jurisdiction of the reviewing court to identify the applicable rules and examine the lawfulness of the decision, particularly where staff members are self-represented. While the Secretary-General argues that a breach based on ST/AI/299 was a new claim, it is in fact merely the legal basis underpinning his factual claim and the UNDT did not exceed its jurisdiction in so finding.

39. The UNDT did not err in fact when it concluded that the Administration had breached ST/AI/299 as the UNON Director-General had a duty to report to Headquarters information related to all of the points enumerated in Section 5(a) to (g) of ST/AI/299. Furthermore, the UNON Director-General did not attempt to obtain more information regarding his arrest from the national authorities. As a result, she did not fulfil her responsibilities under ST/AI/299.

40. The UNDT did not err in awarding compensation as this was warranted on the basis of the UNDT's correct findings, nor did it err in referring DSS/UNON to the Secretary-General for accountability. The Secretary-General also does not have standing to contest the accountability referral since he represents the interests of the Organization and not the individual staff members concerned. Mr. Birya requests that this Tribunal dismiss the Secretary-General's appeal in its entirety.

Considerations

41. Having regard to the submissions made by the Secretary-General, and the answer filed by Mr. Birya, we consider that the issues to be decided are:

(a) Did the Dispute Tribunal err in accepting Mr. Birya's claims regarding the delay involved in establishing the fact-finding panel as receivable?

(b) Did the Dispute Tribunal err in receiving Mr. Birya's claims regarding the complaint against the UNON Administration in relation to his detention and charging by the Kenyan police in August 2013?

42.

submits that at the time Mr. Biryá submitted his UNDT application, the work of the fact-finding panel was still ongoing and that Mr. Biryá could only challenge the resulting administrative decision once the process was completed.

44.

... From the foregoing, we hold that the UNDT erred on a question of law and exceeded its competence in accepting Ms. Nguyen-Kropp and Mr. Postica's applications as receivable.

47. Deciding to set up a fact-finding panel is not of itself a decision relating to the contractual rights of a staff member as decided by the Dispute Tribunal. In the present instance, the decision itself is but one step in the administrative process set out in ST/SGB/2008/5. Insofar as Mr. Birya challenges the delay in establishing the fact-finding panel, we have previously held that the absence of a response to a staff member's request may nonetheless constitute an implied administrative decision.⁶ However, this is not a case where the Administration altogether failed to respond to Mr. Birya's request. To the contrary, throughout the period during which the UNON Director-General was deciding whether to establish a fact-finding panel, she kept Mr. Birya apprised of her actions. Further, the UNON Director-General ultimately decided to constitute a fact-finding panel on 11 September 2013. Such a step is preliminary in nature and irregularities in connection with that decision, including alleged delay in reaching that decision, may only be challenged in the context of an appeal after the conclusion of the entire process.⁷

48. From the foregoing, we hold that the Dispute Tribunal's conclusion that Mr. Birya's application was receivable is without legal basis, as is the Dispute Tribunal's consequent award of compensation based on this finding. The Dispute Tribunal erred on a question of law and exceeded its competence in accepting Mr. Birya's application as receivable.

Did the Dispute Tribunal err in receiving Mr. Birya's claims regarding the complaint against the UNON Administration in relation to the detention and charging of Mr. Birya by the Kenyan police in August 2013?

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Original and Authoritative Version: English

Dated this 2nd day of July 2015 in Geneva, Switzerland.

(Signed)

Judge Adinyira, Presiding

(Signed)

Judge Weinberg de Roca

(Signed)

Judge Chapman

Entered in the Register on this 20th day of August 2015 in New York, United States.

(Signed)

Weicheng Lin, Registrar