



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2014/030

Judgment No. UNDT/2014/113

Date: 25 August 2014

Original: English

Before: Judge Coral Shaw

Registry: Nairobi

Registrar: Abena Kwakye Berko

BIRYA

v.

SECRETARY GENERAL

OF THE UNITED NATIONS

Introduction

1. The Applicant challenges what he describes as:

decision by a fact finding panel formed by the Director General of UNON on 11 September 2013 pursuant to ST/SGB/2008/5 on Prohibited Conduct to delay its commencement of business for over 2 months from its formation consequently failing to make a determination and publication of its report with regulation of section 5.17 of the ST/SGB/2008/5.

2. He requests the Tribunal to resolve:

a. Whether the inordinate long delay by the factfinding Panel to make a determination and publication of its report is in conformity with the provisions of section 5.17 of ST/SGB/2008/5 (Prohibition of discrimination, harassment, and abuse of authority) and

b. Whether the factfinding panel is in breach of duty in delaying the release of the report.

3. The Respondent alleges that the application is not receivable. The Tribunal sought the Applicant's submissions on receivability. These were filed on 24 June 2014. The Tribunal is satisfied that it has sufficient evidence and submissions to make findings on the papers without the need for an oral hearing.

Facts

4. On 18 February 2013, the Applicant filed a complaint of prohibited conduct with the Director General of UNON (DG). A factfinding panel (the panel) was constituted on 11 September 2013 to investigate the complaint. The Applicant challenged, inter alia, the delay in setting up the panel. The Respondent submitted that the challenge was not receivable.

5. By Order No. 062 (NBI/2014) dated 28 March 2014, the Tribunal held that the challenge was receivable and issued a substantive judgment in *Birya* UNDT/2014/092 dated 1 July 2014 in which it found that the delay in constituting the factfinding panel was a breach of duty by DG.

6. On 13 November 2013, the panel invited the Applicant to appear before it as complainant. Following his interview he was advised that the panel was initiating further enquiries as he had raised a number of matters of which the panel had not been aware. The panel told the Applicant that it would not be in a position to complete its investigation and report as soon as it would have liked and asked him to bear with it.

7. On 23 December 2013 the Applicant wrote to the chair of the panel advising

b. The Administration has a duty to ensure that complaints of harassment or abuse of authority are investigated in strict compliance with ST/SGB/2008/5.

c. The Administration has not acted in compliance with the terms of employment which include all pertinent regulations and rules.

d. The Applicant is not only the victim of abuse of authority and harassment but also a victim of the administration's neglect or intentional neglect of his complaint.

e. The Applicant relies on Order No. 062 (supra) and section 5.20 of ST/SGB/2008/5 as well as the requirements in section 2.2 of the SGB for the Organisation to provide effective remedies.

Considerations

Receivability

14. Section 5.17 requires the report of a fact-finding panel to be submitted to the responsible official normally no later than three months from the date of the submission of the complaint. In this case, the process has been delayed beyond the recommended time frame in ST/SGB/2008/5.

15. The first question is whether the Applicant's challenge to the procedure of investigation into a... [The text is heavily garbled and partially cut off at the end of the page.]

17. In relation to the procedures in the Staff Rules for selection for posts and performance evaluation, it is well settled that preparatory decisions which lead to administrative decisions do not in themselves adversely affect a staff member's legal situation "since they modify neither the scope nor the extent of his or her rights." This principle does not however necessarily apply to the process for determining complaints under ST/SGB/2008/5

18. In *Nwuke* UNDT/2010/017, the UNDT was asked, inter alia, to cause the administration to treat as expeditiously as possible the staff member's complaint of victimisation by Advisory Selection Panel. The UNDT held that this was not a receivable challenge to an administrative decision. However, on appeal in *Nwuke* UNAT-2010-099, the Appeals Tribunal (UNAT) held that the claims were receivable.

19. UNAT held that if an individual is dissatisfied with the outcome of administrative procedures he or she may request judicial review of the decisions. It affirmed that an administrative decision includes an omission to act and stated:

..... whether or not the UNDT may review a decision not to undertake an investigation, or to do so in a way that a staff member considers breaches the applicable Regulations and Rules will depend on the following question: Does the contested administrative decision affect the staff member's rights directly and does it fall under the jurisdiction of the UNDT?

In the majority of cases, not undertaking a requested investigation into alleged misconduct will not affect directly the rights of the claimant, because a possible disciplinary procedure would concern the rights of the accused staff member.

20.

30. The provisions of ST/SGB/2008/5 exceptionally create important interim rights for staff members of the United Nations Secretariat who complain of prohibited conduct. The ST/SGB expressly places a duty on managers to act promptly and to preserve the integrity of the process to protect staff members from intimidation or retaliation. In addition section 5.20 of ST/SGB/2008/5 provides that an aggrieved individual who has grounds to believe that the procedure followed in respect of allegations of prohibited conduct was improper may appeal pursuant to chapter XI of the Staff Rules. This section allows an aggrieved individual to challenge the procedures followed before the finalization of the fact-finding investigation.

31. Because of the absolute prohibition of prohibited conduct in the workplace, a failure to act promptly and to maintain the integrity of the formal processes is not just a procedural omission but a breach of duty which may impact on the right of a staff member to be free of intimidation and retaliation.

22. Similarly in *Gehr* UNDT 2012/095, in reliance on *Nwuke* 2010/UNAT-099, the Tribunal held that the Tribunal has jurisdiction to examine the Administration's actions and omissions following a request for investigation submitted pursuant to ST/SGB/2008/5

23. The Respondent submits that the UNAT case of *Masykanova* is inconsistent with this Order. In *Masykanova*, UNAT confirmed the UNDT finding (which was supported by the Respondent) that the applicant's case was both moot because a flawed fact-finding panel had been reconvened and was not receivable because the applicant had not requested management evaluation of the contested issue. The issue before the Tribunal in the present case was not addressed. The Tribunal holds that the facts and circumstances of that case are distinguishable from the present case.

24. Finally, the Tribunal observes that, accepted, the proposition that a staff member is unable to challenge the delay in resolving claims under

25. In summary:

- a. The Tribunal has the jurisdiction to review an act or omission which modifies the rights of a staff member conferred by his or her terms of employment including applicable regulations and rules
- b. The omission of the Administration to act promptly on a complaint as required by ST/SGB/2008/5 is an administrative decision which may be reviewed by the Tribunal before the outcome of the process has been determined by the administration.

Conclusion

26. The Tribunal holds that the allegation of a breach of an administrative decision in this Application is receivable.

The Merits

27. The documentary evidence submitted in this case shows that, following a delay of seven months to convene the fact-finding panel, the investigation took longer than anticipated due to the need to investigate new information that came to the attention of the panel. The Chair of the panel told the Applicant in writing that the report would be completed by mid-June 2014 but as at the date of this judgment no report has been produced. Eighteen months have elapsed from the receipt of the complaint in February 2013 to the present. Eleven months have elapsed since the fact-finding panel was convened.

28. Under section 2.2 of the SGB the Organisation has the duty to take all

29. Section 5.17 states that the “(panels) report shall be submitted to the responsible official normally no later than three months from the date of the submission of the formal complaint or report.”

30. The Tribunal has consistently found that a delay of some months is a breach of that duty. For example, in *Benfield-Laporte* UNDT/2013/162 the Tribunal found that a six-month delay obviously did not meet the requirement of promptness. In *Nwuke* UNDT/2013/157 and *Haydar* UNDT/2012/201 delays of seven months were

not been observed, the Dispute Tribunal, with the concurrence of the Secretary-General of the United Nations, remanded the case for institution or correction of the required procedure, which in any case, should not exceed three months. In such cases, the Dispute Tribunal may order the payment of compensation for procedural delay to the applicant for such loss as may have been caused by such procedural delay, which is not to exceed the equivalent of three months' net base salary.

36. As such, a remand requires the concurrence of the Secretary-General, the Tribunal will suspend the proceedings to enable the Secretary-General to consider his position and advise the Tribunal accordingly.

ORDER

37. The proceedings are suspended until 5 September 2014

38. By 5 September 2014 the Secretary-General is to advise the Tribunal

a. of the present position of the investigation into the Applicant's complaint of prohibited conduct dated 13 February 2013

b. if he concurs with the remand of this case for institution and correction of the procedure under ST/SGB/2008/5

(Signed)

Judge Coral Shaw

Dated this 25th day of August 2014

Entered in the Register on the 25th day of August 2014

(Signed)

Abena Kwakye Berko, Registrar, Nairobi