
UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2015/014

Judgment No.: UNDT/2016/037

Date: 22 April 2016

Original: English

Before: Judge Alessandra Greceanu

Registry: New York

Registrar: Hafida Lahiouel

GALLO

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

Introduction

1. The Applicant, a former Investigator at the P-4 level in the Investigations of the United Nations Secretariat, contests the decision made by the then Chef de Cabinet, on behalf of the Secretary-General, approving the proposal of the Under-Secretary- to delegate to the United Nations Children's Fund the responsibility to make a determination of misconduct on the basis of the report of a fact-finding panel formed under ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority). As remedy, the Applicant requests that the impugned decision be rescinded.

2. The Respondent claims that the application is not receivable *ratione materiae* as it does not concern a final administrative decision under art. 2.1(a) of accordance with ST/SGB/2008/5.

3. In Order No. 26 (NY/2016) dated 1 February 2016, the Tribunal determined that the preliminary issue of receivability *ratione materiae* was to be decided on the papers before it be

purposes, the Applicant changed the ending to read:

the

member in OIOS.

6.

officer requested the Director of ID/OIOS to initiate a formal investigation into the matter in accordance with sec. 5.11 of ST/SGB/2008/5.

7. By memorandum dated 31 January 2014, the then USG/OIOS appointed a fact-

the Applicant for prohibited conduct under ST/SGB/2008/5. On the same date, by memorandum, the then USG/OIOS informed the Applicant of the initiation of the fact-finding investigation and the establishment of the panel.

8. On 4 February 2014, the Applicant requested management evaluation of this decision, and after receiving the management evaluation response on 10 March 2014, he appealed the decision to the Dispute Tribunal (Case No. UNDT/NY/2014/017). In *Gallo* UNDT/2015/073, the Tribunal dismissed the decision against this decision as not receivable, and the decision was not appealed.

9. On 31 March 2014, the fact-finding panel submitted its investigation

Case No. UNDT/NY/2015/014

Juent

18. By letter dated 30 March 2015, the Officer-in-Charge of the Management Evaluation Unit informed the Applicant that, in response to his request for management evaluation, his request was found to be not receivable.

19. On 30 March 2015, the Respondent filed a submission/motion notifying the Tribunal of a change of counsel and requesting a 30-day extension of time to file his reply.

20. On the same day, the Tribunal (Duty Judge) issued Order No. 52 (NY/2015), by which the Respondent was instructed to file a reasoned request for the substitution of counsel and the Applicant was allowed to file his comments on until 27 April 2015 was also granted.

21. By letter dated 1 April 2015, the Deputy Secretary-General informed the letter will serve as a written reprimand, issued pursuant to Staff Rule 10.2(b),

22. The parties filed their submissions pursuant to Order No. 52 (NY/2015) on 6 and 7 April 2015.

23. By Order No. 63 (NY/2015) dated 10 April 2015, the Applicant was requested to confirm his current and future location for purposes of all further proceedings and to indicate whether he was still represented by the Counsel of record; the Respondent was granted a further extension of time to file his reply until 26 May 2015.

24. The Applicant duly filed his submission according to Order No. 63 (NY/2015) on 16 April 2015.

25. By Order No. 68 (NY/2015) dated 23 April 2015, the Tribunal (Duty Judge) granted the newly assigned Counsel for the Respondent (the current

Case No. UNDT/NY/2015/014

Judgment

their closing submissions on the preliminary issue of receivability, based solely on and summarizing their submissions already on record by 26 February 2016.

33. By notice of change of Counsel dated 8 February 2016 (filed in the eFiling portal on 19 February 2016), the Applicant informed the Tribunal that, due to the the litigation *pro se*

34. On 26 February 2016, the Respondent filed his response to Order No. 27 (NY/2016) while the Applicant filed no such response.

on receivability

35.

follows:

- a. Article 2.1(a) of the Dispute T
the Dispute Tribunal shall be competent to hear and pass judgment on
an
that is alleged to be in non-compliance with the terms of appointment or

Tribunal defined an administrative decision in Judgment No. 1157,
Andronov (2003). In *Planas*

b. Based on the foregoing, the present contested decision does not produce direct legal consequences for the Applicant, as it cannot be characterized as a final administrative decision, and was only a step in reaching a final conclusion in the process. Only the final decision made under sec. 5.18(c) of ST/SGB/2008/5 constitutes the conclusion of the formal procedures and a final (contestable) administrative decision. It is not until the process is completed (or abandoned) that the subject of an investigation has a decision that affects the terms of his or her contract, in accordance with art. 2.1(a) of the Statute;

c. Similarly, all of the steps in an ongoing selection process prior to the final selection decision are qualified as a preparatory decision which are one of a series of steps which lead to a final (contestable) administrative decision (*Ishak* 2011-UNAT-152, para. 29). In this connection, the Dispute Tribunal has held that issues such as the composition of the rebuttal panel can only be challenged in the context of an appeal against the outcome of that process, but cannot alone be the subject of an application;

d. This position on the non-receivability of preparatory decisions (or preliminary steps in a process) was endorsed by the Appeals Tribunal in *Nguyen-Kropp & Postica* 2015-UNAT-509, on two appeals filed by the Secretary-General against three judgments rendered by the Dispute Tribunal, including one appeal against two judgments on receivability dated 22 February 2013 (*Nguyen-Kropp* UNDT/2013/1028 and *Postica* UNDT/2013/029), and the other appeal against the judgment on the merits (*Nguyen-Kropp & Postica* UNDT/2013/176). Particular reference is made to paras. 34 and 35 of 2015-UNAT-509 *Nguyen-Kropp & Postica* 2015-UNAT-509, in which the Appeals Tribunal vacated the Dispute judgments on receivability and, consequently, the j/FETBT1 0 0 1 443.02 1(is)-167(r

as the Applicant is not contesting any actual final decision taken under
ST/N

Considerations

Applicable law

37. Articles 2 and 8 of the Statute of the Dispute Tribunal state, in relevant parts:

Article 2

1. The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual, as provided for in article 3, paragraph 1, of the present statute, against the Secretary-General as the Chief Administrative Officer of the United Nations:

(a) To appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the

relevant administrative issuances in force at the time of alleged non-compliance;

(b) To appeal an administrative decision imposing a disciplinary measure;

(c) To enforce the implementation of an agreement reached through mediation pursuant to article 8, paragraph 2, of the present statute.

Article 8

1. An application shall be receivable if:

(a) The Dispute Tribunal is competent to hear and pass judgement on the application, pursuant to article 2 of the present statute;

(b) An applicant is eligible to file an application, pursuant to article 3 of the present statute;

(c) An applicant has previously submitted the contested administrative decision for management evaluation, where required; and

(d) The application is filed within the following deadlines:

(i) In cases where a management evaluation of the contested decision is required:

a. Within 90 calendar days of the response by management to his or her submission; or

b. Within 90 calendar days of the expiry of the relevant response period for the management

3. Where the parties have sought mediation of their dispute, the application shall be receivable if filed within 90 calendar days after mediation has broken down.

5. In exceptional cases, an applicant may submit a written

the names of witnesses or particular details of incidents. All persons interviewed in the course of the investigation shall be reminded of the policy introduced by ST/SGB/2005/21.

5.16 The fact-finding investigation shall include interviews with the aggrieved individual, the alleged offender and any other individuals who may have relevant information about the conduct alleged.

5.17 The officials appointed to conduct the fact-finding investigation shall prepare a detailed report, giving a full account of the facts that they have ascertained in the process and attaching documentary evidence, such as written statements by witnesses or any other documents or records relevant to the alleged prohibited conduct. This report shall be submitted to the responsible official normally no later than three months from the date of submission of the formal complaint or report.

5.18 On the basis of the report, the responsible official shall take one of the following courses of action:

(a) If the report indicates that no prohibited conduct took place, the responsible official will close the case and so inform the alleged offender and the aggrieved individual, giving a summary of the findings and conclusions of the investigation;

(b) If the report indicates that there was a factual basis for the allegations but that, while not sufficient to justify the institution of disciplinary proceedings, the facts would warrant managerial action, the responsible official shall decide on the type of managerial action to be taken, inform the staff member concerned, and make arrangements for the implementation of any follow-up measures that may be necessary. Managerial action may include mandatory training, reprimand, a change of functions or responsibilities, counselling or other appropriate corrective measures. The responsible official shall inform the aggrieved individual of the outcome of the investigation and of the action taken;

(c) If the report indicates that the allegations were well-founded and that the conduct in question amounts to possible misconduct, the responsible official shall refer the matter to the Assistant Secretary-General for Human Resources Management for disciplinary action and may recommend suspension during disciplinary proceedings, depending on the nature and gravity of the conduct in question. The Assistant Secretary-General for Human Resources Management will proceed in accordance with the applicable disciplinary procedures and will

previously submitted the contested administrative decision for management evaluation, where required (art. 8.1(c) of the Statute);

c. The application is receivable *ratione temporis* if it was filed before the Tribunal within the deadlines established in art. 8.1(d)(i) (iv) of the Statute and art. 7.1 7.3 of the Rules of Procedure.

44. It results that for being considered receivable by the Tribunal, an application must fulfil all the mandatory and cumulative requirements mentioned above.

Receivability ratione personae and temporis

45. The Applicant ~~a former~~ OIOS staff member filed a management evaluation request of the contested decision on 16 January 2015 and the present application on 26 February 2015, within 90 days of the expiry of the relevant response period for management evaluation. Consequently, the application is receivable *ratione personae* and *ratione temporis*. The Tribunal will therefore consider whether the application is also receivable *ratione materiae*.

Receivability ratione materiae

46. The Tribunal notes that, pursuant to secs. 5.14 to 5.18 of ST/SGB/2008/5, a formal

would warrant managerial action. In this case, the decision-maker is the responsible official who shall decide on a type of managerial action to be taken, inform the staff member concerned, and make arrangements for the implementation of any follow-up measures that may be necessary. The managerial action may include mandatory training, reprimand, a change of functions or responsibilities, counseling or appropriate corrective measures. The responsible official shall also inform the aggrieved individual of the outcome of the

disciplinary action. Therefore, the contested decision is of a preliminary nature and not a final administrative decision with direct and independent legal consequences on the alleged

51. Section 5.20 of ST/SGB/2008/5 states that:

Where an aggrieved individual or alleged offender has grounds to believe that the procedure followed in respect of the allegations of prohibited conduct was improper, he or she may appeal pursuant to chapter XI of the Staff Rules.

52. This section is the last sec. 5

) of ST/SGB/2008/5. The Tribunal is of the view that, since this provision is inserted at the end of the section after all the formal

Case No. UNDT/NY/2015/014

Judgment No. UNDT/2016/037

Conclusion

58. In the light of the foregoing, the Tribunal DECIDES:

The application is rejected as non-receivable.

(Signed)

Judge Alessandra Greceanu

Dated this 22nd day of April 2016

Entered in the Register on this 22nd day of April 2016

(Signed)

Hafida Lahiouel, Registrar, New York