



Before: Judge Alessandra Greceanu

Registry: New York

Registrar: Hafida Lahiouel

CANDUSSO

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Alan Gutman, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant contests the Secretary-General's lack of response to his request for access to the United Nations' internal website ("iSeek") for the purpose of addressing comments contained in a letter that was posted on iSeek by the then President of the United Nations Staff Union ("President").

Facts

2. On 27 May 2010, "[a] Letter from the President of the United Nations Staff Union No. 5" ("the Letter") was published on iSeek.

3. On 3 June 2010, the Applicant wrote a letter to the Secretary-General whereby he requested that the Letter be removed from iSeek and that he be provided "access to respond to [the President's] letter in the same manner as it was posted".

4. On 8 June 2010, the then Director, Outreach Division, Department of Public Information, who also acted as the Chair of the Editorial Board of iSeek advised the Applicant and the President of the Staff Union that the Letter had been removed from iSeek due to the fact that it did not comply with its publishing guidelines.

5. On 13 July 2010, having received no response to his 3 June 2010 request for "access" to iSeek for the purpose of being able to respond to the Letter, the Applicant wrote a follow-up letter to the Secretary-General.

6. On 2 August 2010, the Applicant requested a management evaluation of the decision to publish the Letter. The Applicant also requested to be able to respond to its content directly on iSeek.

7. On 3 September 2010, a note was published on iSeek by the iSeek Supervisor, in the same manner and format as the Letter, explaining why the 27 May 2010 letter had been removed, namely that "some of the content was found not to be in conformity with the iSeek Guidelines".

8. On 8 September 2010, the then Chief, Management Evaluation Unit (“MEU”) addressed a letter to the Applicant informing him that the removal of the Letter and the ensuing posting of an explanatory note provided the Applicant with an appropriate remedy resulting in the “request for management evaluation [becoming] moot”.

9. On 7 December 2010, the Applicant filed the present application contesting the decision not to provide him with the same access to iSeek as that originally provided to the then President of the Staff Union.

10. On 19 July 2012, the Dispute Tribunal issued Order No. 149 (NY/2012) requesting that the parties file submissions in response to the Respondent’s claim that the present application was not receivable due to the absence of any actual contestable administrative decision, as well as whether they objected to the case being disposed of on the papers. The submissions were duly filed.

11. On 9 August 2012, the Applicant provided the Tribunal with his submission in response to Order No. 149, in which he stated that the decision not to “allow [him] the same access to respond to [the Letter] in the same way as it was posted” was a contestable administrative decision. The Respondent submitted his response to Order No. 149 on 23 August 2012 whereby he stated that the Applicant “fail[ed] to respond to the receivability argument presented by the Respondent”.

Applicant’s submissions

12. The Applicant’s principal contentions may be summarized as follows:

a. The contested administrative decision is the Secretary-General’s decision not to “allow [the Applicant] the same access to respond to [the Letter] in the same way as it was posted”;

b. The decision by the Administration to remove the Letter from iSeek, and replace it with an explanatory note, constituted an incomplete remedy

resulting in a breach of several rights of United Nations staff members, as well as basic principles of the rule of law;

c. The United Nations has not provided a reasonable and timely remedy to restore the Applicant's reputation and integrity that were aggrieved as a result of the publication of the Letter on iSeek, which contained false and damaging information resulting in "a reckless disregard for the truth and for [the Applicant's] rights as a staff member";

d. The Secretary-General failed to uphold the standard of conduct expected of the United Nations and also failed to ensure that the rights of the Applicant were respected resulting in a breach of his rights and of his terms of appointment;

e. The MEU, by waiting until 8 September 2010 to respond to his request for management evaluation, appears to have missed their deadline to respond to his request. It further appears that the sole purpose of this delay was to enable iSeek to post a note on their site regarding the 8 June 2010 removal of the Letter thereby resulting in the MEU being able to make the statement that his case was "moot";

f. The Applicant requests the same access to iSeek for the purpose of being able to respond to the Letter or, alternatively, USD5,000 for the breach of the Applicant's due process rights and USD500 for the MEU's failure to comply with the applicable deadlines.

Respondent's submissions

13. The Respondent's principal contentions may be summarized as follows:

a. The Applicant did not respond to the Respondent's arguments regarding receivability, he did not demonstrate that he undertook the required steps to have an article published on iSeek, and he did not identify which of

his contractual rights were breached as a result of the publication of the Letter;

b. The Letter was published on a Staff Union bulletin that was created for the purpose of sharing information with all staff members. “The establishment of this bulletin on iSeek does not constitute an individual administrative decision taken in a distinct individual case, creating direct legal consequences to the legal order”;

c. The distribution of the Letter is not an administrative decision as the Administration was not involved and took no decision with regard to the Letter’s content and publication;

d. The Applicant’s claim that the Secretary-General breached his rights by not responding to his request to submit a response to the Letter is not receivable as the Applicant did not exhaust the available administrative procedures. Namely, the Applicant did not attempt to submit a letter or article to the iSeek Editorial Board prior to stating that he was denied the right to submit a response;

e. Consistent with the principle of freedom of association, the Administration did not conduct an editorial or factual review of the Letter which had been submitted for distribution by an authorized officer of the Staff Union. “As the Administration’s review revealed no material that was *prima facie* a violation of the iSeek guidelines the letter was distributed on iSeek”;

f. Upon being informed of the Applicant’s concerns regarding the content of the Letter, the iSeek Editorial Board reviewed the Letter and concluded that it was inconsistent with its guidelines resulting in the Letter being removed, followed by the publication of a note expressing the reasons behind its removal;

g. No staff member has an automatic right to publish an article on iSeek. Rather there is a procedure in place under which anyone may submit a letter or article for publication. Consequently, the Tribunal cannot order that a letter be published without prior review or that monetary compensation be awarded in lieu of specific performance;

h. The Applicant has not shown that any of his rights were violated. Similarly, the Applicant's claim regarding the MEU delays in responding to his request are without merit.

Consideration

Removal of the Letter from iSeek

14. The iSeek editorial guidelines provide that should any staff member wish to request "the editing and/or removal of content already posted [the request] shall be considered by the iSeek team and, if necessary, by the Editorial Board. If a story is removed in its entirety, it will be replaced with an explanatory note signed by the iSeek supervisor, indicating by whom and why the content was asked to be removed".

15. The Letter was published on Thursday, 27 May 2010; the Applicant wrote a letter to the Secretary-General with regard to the content of the Letter on Thursday, 3 June 2010; and the Letter was removed from iSeek on Tuesday, 8 June 2010. Upon removing the Letter from its site, the Chair of the Editorial Board informed the Applicant and the author of the Letter that the Letter was in breach of sec. V of its guidelines and that while they attempt "to be vigilant in making sure that content does adhere strictly to these Principles ... an oversight was made in this case". Finally, as required by the iSeek's guidelines, a note was posted on its site on 3 September 2010 expressing the reason behind the removal of the Letter.

16. In *Calvani* UNDT/2010/027, *Lorand* UNDT/2011/157 and *Kamanou* UNDT/2012/048, the Tribunal found that as a result of the rescission of the contested

decision the applications before the Tribunal were not receivable as none of the rights and terms of appointment of the staff members concerned were being breached at the time the application was filed, nor had they incurred any identifiable damages.

17. In reviewing the applicable timeline, the Administration acted swiftly to address the Applicant's concerns with regard to the content of the Letter by having it removed from iSeek within three business days of being notified of any potential conflict.

18. Consequently, and while the Tribunal notes that a three month delay did occur between the removal of the Letter and the posting of an explanatory note regarding the said removal, the timely rescission of the publication of the Letter negated any potential harm or breach of the Applicant's rights that may have occurred in the present case.

Publication of a response

19. The Appeals Tribunal held in *Tabari* 2010-UNAT-030 and *Nwuke* 2010-UNAT-099, that not taking a decision, for example by not responding to a request for investigation or a complaint, also constitutes an administrative decision capable of being contested.

20. By taking specific steps to address the content of the Applicant's letters to the Secretary-General, the Administration took a decision which resulted in the removal of the Letter from iSeek. However, while the Administration had the letter re-reviewed against the iSeek guidelines, it did not address the Applicant's request for unfettered access to iSeek for the purpose of publishing a rebuttal to the Letter. Consequently, the Administration took the implicit decision of not providing the Applicant with his requested remedy to the publication of the Letter.

21. In considering whether the Applicant's rights were breach by the latter decision, the Tribunal notes that at no point in time did the Applicant avail himself of his right to submit an article to the iSeek team for the purpose of having it posted on

iSeek in response to the Letter. Furthermore, aside from the fact that the Tribunal considers that in view of the timely rescission of the decision to post the Letter on iSeek none of the Applicant's rights were breached, it is not within its statutory powers to order the remedy requested by the Applicant.

22. For the Tribunal to grant the Applicant unfettered access to iSeek for the purpose of publishing a rebuttal letter without having it reviewed by the iSeek team to make sure that it conforms with its publishing guidelines would be akin to the Tribunal ordering a potential breach of the iSeek guidelines. Consequently, the only remedy available to the Applicant is to submit a letter directly to the iSeek team using the publication procedures currently in place, a remedy which does not need to be ordered by the Tribunal. The Applicant is also therefore not entitled to receive any compensation.

MEU deadlines

23. The Applicant states in his submission that by not responding to his request for management evaluation within 30 days the MEU "missed their deadline to respond". The Applicant therefore requests to be compensated in the amount of USD500 for this delay.

24. While art. 8(1)(i)(b) of the Tribunal's Statute clearly states that the MEU has 30 calendar days to respond to a request for management evaluation made by an applicant situated at Headquarters, it also adds that, should the staff member not have received a response within the imparted time, he has 90 calendar days "as of the expiry of the relevant response period for the management evaluation" to formulate his appeal to the Tribunal.

25. While the MEU's response was provided to the Applicant beyond the 30-day time limit identified in the Tribunal's statute, none of his rights were breached and the Applicant did not incur any damages from this procedural delay. Furthermore, the Tribunal's statute clearly provides staff members with an applicable remedy for such situations. The Applicant is therefore not entitled to receive any compensation.

Conclusion

26. The application is rejected.

(Signed)

Judge Alessandra Greceanu

Dated this 19th day of November 2012

Entered in the Register on this 19th day of November 2012

(Signed)

Hafida Lahiouel, Registrar, New York