UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2011/004
Judgment No.: UNDT/2013/029
Date: 22 February 2013
Original: English

Before: Judge Goolam Meeran

Registry: New York

Registrar: Hafida Lahiouel

POSTICA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

ON RECEIVABILITY

Counsel for Applicant:
Thad M. Guyer

Counsel for Respondent:
Susan Maddox, ALS/OHRM, UN Secretariat

Introduction

1. On 12 January 2011, the Applicant, a Senior Investigator at the P-5 level with the Investigations Division of the Office of Internal Oversight Services ("OIOS"), filed an application in which he identified the contested administrative decision as the decision to commence what is described as "a secret and retaliatory investigation" against him.

2. By the reply dated 13 February 2011, the Respondent submits that the application is not receivable pursuant to art. 8.1 of the Statute of the Dispute Tribunal in that the Applicant's appeal is time-barred and in that it does not concern a contestable administrative decision.

3. This case was assigned to the undersigned Judge in October 2012. Given the need to clarify the confusion arising from the fact that the Applicant has brought two separate applications (in addition to this case, the Applicant also has Case No. UNDT/NY/2011/055 pending), which appear to be linked with two other separate applications by his co-worker Ms. Nguyen-Kropp (UNDT/NY/2010/107 and UNDT/NY/2011/054), it was decided to have a joint case management discussion with all the parties, who were being represented by the same counsel. It was common ground that, in the interests of judicial and administrative economy, consideration should be given to combining all four cases subject to the issue of receiveability being determined first in this case (and in *Nguyen-Kropp* UNDT/NY/2010/107).

4. Although there are broad similarities between the cases brought by the two applicants, there are also certain distinct differences which necessitate separate judgments on the preliminary issue of receiveability. Once this issue is determined in relation to both the Applicant as well as Mr. Postica, the Tribunal will consider whether an order for combined proceedings is appropriate. As a necessary first step, the Respondent was ordered to file and serve updated submissions on the question of

receiveability in this case and *Nguyen-Kropp* UNDT/NY/2010/107. The Applicant was to file and serve a response. Both parties complied with the order, although after a short delay because of the problems following Hurricane Sandy in New York.

Findings of facts

5. In the amended reply regarding receivability, dated 6 November 2012, the Respondent provided a chronology of facts, which is set out below (the same chronology was repeated in the reply in *Postica* UNDT/NY/2011/004; hence, reference is made to "the Applicants"). Although not acknowledging these facts, the Applicant has not disputed their accuracy.

> … The European Union Anti-Fraud Office ["OLAF"] had an arrangement with the Department of Management ["DM"] to consider requests for conducting investigations into matters relating to the United Nations Secretariat where it was appropriate for the investigators to be external to the Secretariat. On 30 June 2010, senior officials of OLAF received such a request from a DM official concerning an investigation into possible misconduct by the Applicants …
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> … On 14 July 2010, one of the Applicants, who was then on leave from his position in the OIOS at the United Nations and working at OLAF, held a meeting with senior officials of OLAF and "detailed" to them "the nature of the allegations made against him" …
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> … Counsel for the Applicants submitted separate requests for action by the Ethics Office under ST/SGB/2005/21 (Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations) on 30 July 2010 and 2 August 2010 … In the submissions to the Ethics Office, an account was set out of the following matters: (a) the request by Ms. Inga-Britt Ahlenius, the then Under-Secretary-General for Internal Oversight Services ["USG/OIOS"] to the Professional Practise [sic] Service ["PPS"], OIOS, to review the impact of a Note to File submitted by one of the Applicants regarding a then recently completed investigation; (b) the decision conveyed by the USG/OIOS to one of the Applicants by an email dated 9 April 2010 not to pursue the matters raised by him in his Note to File; (c) the report dated 25 March 2010 of possible misconduct by the Applicants, prepared by PPS,

regarding procedural and investigative irregularities in an investigation conducted by the Applicants that was submitted to the USG/OIOS; (d) a memorandum dated 9 April 2010 from the USG/OIOS to Ms. Angela Kane, the then Under-Secretary-General for Management ["USG/DM"] to arrange for an entity external to OIOS to undertake an investigation into the report of possible misconduct by the Applicants submitted by PPS and a subsequent memorandum dated 6 May 20 I 0 from the USG/OIOS to the USG/DM about the reasons for her request that the investigation into possible misconduct by the Applicants be conducted under the auspices of the USG/DM. The Alleged Retaliation Letters included an extensive quote of the 6 May 2010 memorandum. The Alleged Retaliation Letters also contained information about the efforts by DM officials to obtain the assistance from outside entities to undertake the investigation requested by the USG/OIOS, referring, in particular, to a request for assistance made to the World Bank and, allegedly, the European Bank for Reconstruction and Development ["EBRD"] (as set out in the Ethics Office's comments on the applications in cases UNDT/NY12011/054 and UNDT/NY/20111055, the Respondent maintains that the EBRD did not receive the PPS documentation disclosing the names of the Applicants).

… By a letter dated 23 August 2010 … [C]ounsel for the Applicants submitted a second letter to the Ethics Office attaching a copy of the 9 April 2010 memorandum from the USG/OIOS to the USG/DM together with, inter alia, a copy of the report of misconduct dated 25 March 2010 prepared by PPS. The letter noted that the Applicants had not "officially been provided a copy of" this material.

… By a letter dated 4 October 2010 … [C]ounsel for the Applicants requested management evaluation of the following matters: (a) the failure of the Ethics Office to respond to the Applicants['] letters dated 30 July 2010 and 2 August 2010 within 45 days; (b) the failure by DM and OIOS to protect one of the Applicants from retaliation by not taking all appropriate interim measures; (c) the dissemination of information relating to the report of possible misconduct by the Applicants to possible external investigating entities, including the World Bank and OLAF without first seeking the input of the Applicants; (d) the decision by the USG/OIOS to request PPS to investigate the Note to File; and (e) the removal of the Note to File from the supporting documentation underlying an investigation undertaken by the Applicants.

… By letters dated 4 November 2010 … the Management Evaluation Unit ["MEU"] responded to the Applicants stating that, for

> various reasons, the matters raised were not subject to review by the MEU. With regard to an investigation into possible misconduct by the Applicants, the letters from MEU stated that "there is no ongoing investigation involving you at the Department of Management's behest at this time".
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> … Although there is no requirement in the internal policies to provide notice of a decision to launch an investigation to the subjects thereof, by memoranda dated 30 December 2010 from the USG/DM …, nonetheless, and in light of the statements set out in the letters from the MEU about there being no-ongoing investigation as at 4 November 2010, the Applicants were informed that an investigation would begin into possible misconduct by them on 8 January 2011 with regard to "alleged irregularities [which] were brought to the attention of Mrs. Ahlenius by the ... [PPS] by way of a note dated 25 March 2010".

Respondent's submissions

6. The Respondent's submissions may be summarized as follows:

a. The Appeals Tribunal held in *Costa* 2010-UNAT-036 and *Sethia* 2010-UNAT-079 that the Dispute Tribunal does not have the power to waive or suspend the time limits for requests for management evaluation;

b. The complaint is time-barred because more than 60 days prior to the date of their Counsel's letter requesting management evaluation, namely on 4 October 2010, the Applicants were fully aware of the terms of the decision to initiate an investigation into their possible misconduct, which they regarded as being retaliatory;

c. Although the requirement for a written notice of a decision set out in staff rule 111.2(a) was relied on by the Appeals Tribunal in their decision overturning the Dispute Tribunal's decision that an appeal was time-barred (*Schook* 2010-UNAT-013). Other decisions of the Dispute Tribunal have clearly accepted that an inferred decision was sufficient for a staff member to

launch a case by requesting a management evaluation (*Appleton* Order No. 289 (NY/2010));

d. Section 2 of ST/AI/371 (Revised disciplinary measures and procedures), in effect in April 2010, provided that the Head of Office shall undertake an investigation "where there is reason to believe that a staff member has engaged in unsatisfactory conduct for which a disciplinary measure may be imposed". In the exercise of her discretion and on the grounds set out in the 25 March 2010 PPS memorandum, the USG/OIOS considered that she had before her sufficient information to require the commencement of an investigation under the terms of ST/AI/371. No internal regulation stipulates that the subject of a report of misconduct be consulted or advised of the matter. The requirements of fairness are maintained because a staff member, who is the subject of an investigation, is provided with adequate opportunity to answer the allegations against him or her during the course of the investigation (which occurred in the present case during their respective interviews with the investigator as well as by the investigator providing the Applicants the opportunity to provide comments on the draft investigative details);

e. On 30 July 2010, the Applicant was fully aware of the terms of Ms. Ahlenius' decision to undertake an investigation and the basis upon which she had made this decision. It was made without Ms. Ahlenius first seeking the Applicant's comments. Nevertheless, the Applicant did not file a request for management evaluation until 4 October 2010, more than sixty calendar days after she had received notice of this decision;

f. The notification, dated 30 December 2010, from Ms. Kane to the Applicant implemented the 9 April 2010 decision by Ms. Ahlenius to

conduct an investigation and does not constitute a new administrative decision regarding this matter;

g. ST/AI/371/Amend.l (Revised disciplinary measures and procedures), ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority) and ST/SGB/2005/21 (Protection against retaliation for reporting misconduct and for cooperating with duly authorized audits or investigations) set out procedures to be followed in relation to the matters covered by these administrative issunaces. The individual steps of these procedures do not give rise to a decision that affects the term and conditions of a staff member's appointment unless and until the Administration has completed the process or has explicitly or implicitly indicated that it will not complete the process;

h. It is not until the investigative process is completed or abandoned that the subject of the investigation has a decision that affects the terms of his or her contract. Similarly, if a final decision is taken not to undertake an investigation, it is, at this point, that a staff member may have a basis for seeking redress through the internal justice system (the Respondent relies on *Abboud* UNDT/2010/001 (upheld, in part, by the Appeal Tribunal in 2010-UNAT-100 and *Nwuke* 2010-UNAT-099);

i. If the Tribunal were to consider individual steps of a process as giving rise to an administrative decision, the Tribunal would be placed in the position of undertaking the day-to-day management of that process rather than the Administration. Undertaking a managerial role is neither in keeping with the Tribunal's role as an independent judiciary, nor is it envisaged in the Tribunal's Statute;

j. Although a number of months passed between Ms. Ahlenius' decision that an investigation into the possible misconduct detected by the PPS should

be undertaken and its commencement, the Applicant did not indicate in his application that he considered that decision to investigate to be abandoned. Rather, he indicated that he considered the undertaking of the investigation to be imminent. Furthermore, he was informed on 30 December 2010 that a second investigation was, in fact, commenced. Thus, the procedure set out in ST/AI/371/Amend.1 continues. Until a final decision is taken, such as the decision to close the matter following completion of the investigation or a decision to impose an administrative or disciplinary measure, there is no administrative decision that may be contested before the Tribunal;

Applicant's submissions

7. The Applicant's contentions may be summarized as follows:

a. There was no decision taken by Ms. Ahlenius to initiate an external investigation. Ms. Ahlenius' recommended that the Department of Management refer the case to an external, independent expert, who would conduct a preliminary fact-finding inquiry. She specifically noted in her request that "the Department of Management is best suited to administer such cases". The Department of Management undertook to determine whether investigators from other international organizations would carry out such an investigation. It was the very act of "the shopping around" for investigators that was the subject of the Applicant's complaint to the Ethics Office, alleging that this activity damaged her reputation irrevocably;

b. The Applicant did not receive "notice," either verbally or in writing, of the decision to initiate an investigation until 4 January 2011, when he received the memorandum dated 30 December 2010 signed by Ms. Kane. The actual decision to initiate the investigation, therefore, was taken by Ms. Kane in December, 2010, and not by Ms. Ahlenius. Prior to that time, the Applicant

had only the documents in question informally from an anonymous source. In fact, at no time did the Administration notify the Applicant that a decision had been taken to conduct an investigation or that the DM was engaging in efforts to enlist several external investigative bodies. He was only informed that the investigation was about to begin two days after Ms. Nguyen-Kropp filed an application with the Tribunal;

c. The deadline in staff rule 11.2(c) plainly requires that an official "notification of the administrative decision" must be communicated by the decision-making unit to the staff member. No fair or practical reading of the rule would allow a prejudicial triggering of the deadline simply because the staff member has learned of the apparent decision through unofficial sources and rumours rather than the official decision making unit. In interpreting and applying staff rule 11.2(c), the Tribunal must be guided by a fair and practical reading of the rule's language and intent (*Schook*, 2010-UNAT -018);

d. The Applicant was officially informed in writing that there was no investigation pending against him. The MEU's response stated that "the MEU understands that there is no ongoing investigation involving [the Applicant] at the Department of Management's behest at this time". The MEU at no point informed the Applicant that her request was not receivable because it was outside the statute of limitations.

Consideration

Is the Applicant's appeal against the decision to conduct an alleged "secret and retaliatory" investigation time-barred?

8. Staff rule 11.2 sets out the following relevant provisions regarding the requirements for requesting management evaluation of a contested decision before filing an application with the Dispute Tribunal (emphasis added):

> (a) A staff member wishing to formally contest an administrative decision alleging non-compliance with his or her contract of employment or terms of appointment, including all pertinent regulations and rules pursuant to staff regulation 11.1 (a), *shall, as a first step, submit to the Secretary-General in writing a request for a management evaluation of the administrative decision.*
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> …
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> (c) A request for a management evaluation shall not be receivable by the Secretary-General unless it is sent within sixty calendar days from the date on which *the staff member received notification of the administrative decision to be contested*.

9. Paragraph 2 of ST/AI/371/Amend.1, which amends ST/AI/371 and which took effect on 11 May 2010, provides as follows regarding the initiation of an investigation that may possibly lead to disciplinary measures (emphasis added):

> Where there is reason to believe that a staff member has engaged in unsatisfactory conduct for which a disciplinary measure may be imposed, the head of office or responsible officer shall undertake *an* investigation.

10. The original para. 2 in ST/AI/371 stated that (emphasis added):

> Where there is reason to believe that a staff member has engaged in unsatisfactory conduct for which a disciplinary measure may be imposed, the head of office or responsible officer shall undertake *a preliminary* investigation.

11. The OIOS Investigations Manual describes the nature of investigations, including the investigative process, as follows (Chapter 2.1):

> The process of investigating matters of possible misconduct is a function of the accountability system in the United Nations. As such, the process is generally part of the internal justice system designed to ensure employee accountability and is, therefore, strictly administrative. The contract of employment reflects the duties of employees to act in a certain manner, including cooperating with investigations into possible contravention of those duties, and the employer's obligation towards the employee during the course of any investigation and potential disciplinary process that may result …

As an administrative process, investigations follow prescribed steps defined by the employer's obligations towards the employee to ensure procedural fairness. As a first step, the investigation process generally commences with a report of possible misconduct. The intake of matters for investigation requires a methodical and consistent approach for receiving, recording, screening, and assigning matters for investigations … The intake also serves as a foundation for and, to a certain extent, initiates the next step of investigation planning.

The investigation process continues with the steps of planning and preparation … These steps include both formal and informal actions designed to ensure effective disposition of the investigation, as well as to support post-investigation management action. The steps of planning and preparation are, therefore, critical to the effective execution of investigation responsibilities.

The execution of an investigation plan is the culmination of technical expertise in methods and techniques, as well as competence in the organizational requirements for the administrative process that includes the administration of justice, and primarily relates to the collection of facts … As such, the investigation is one part of the entire system of accountability and must be executed in a manner that supports that system.

The conclusion of an investigation is not the final step. Rather the conclusion is the point where a decision is made that either:

- there is sufficient factual information to make recommendations about the reported possible misconduct; or
- the matter can no longer be effectively pursued and must be closed.

As with the decision at intake on whether an investigation is to be initiated, the decision of how and when to close the investigation is discretionary and must take into account the interests of the Organization and the requirements of the system of accountability.

Whatever the conclusion of an investigation, a written report should be prepared to record the process, result and recommendations, if any … The reporting step is critical to communicating information to relevant managers and creating the auditable record for future review and assessment, particularly during any internal justice process or when the investigator's exercise of discretionary authority is challenged.

With the completion of a report, the process of investigation is concluded. However, investigation personnel may still be required to support post-investigation activities that fall within the authority of the

> Organization as part of the system of accountability. This includes management's consideration of whether disciplinary or remedial action is necessary and the procedures for imposing a sanction. Investigation personnel may be called upon to explain the investigation process, as well as information about the findings and conclusions of a specific case. This responsibility may extend to providing testimony before internal review bodies and even national authorities should the matter result in a criminal prosecution …

12. On 4 January 2011, the Applicant first received written notification that an investigation was to take place. He did not request management evaluation of that decision. In essence, this is the same decision in respect of which he had requested a management evaluation on 4 October 2010, only to be told by the MEU on 4 November 2010 that there was no "pending" investigation. This is admitted by the Respondent in the reply, which explicitly states that the notification of 4 January 2011 was merely Ms. Kane's (USG/DM) implementation of Ms. Ahlenius' (USG/OIOS) decision taken on 9 April 2010 to conduct an investigation against the Applicant. In effect, the Respondent therefore states that Ms. Kane's notification on 4 January 2011 did not constitute a new administrative decision regarding the matter as Ms. Ahlenius had already made the decision to initiate an investigation against the Applicant on 9 April 2010. By this line of argument, there was no requirement for the Applicant to request a second management evaluation. The only issue is whether the request made to the MEU, on 4 October 2010, was within the 60 days of receipt of notification of the impugned decisions, as required pursuant to staff rule 11.2(c).

13. The entire process regarding the Applicant being investigated for perceived misconduct constitutes one and the same investigation, which started from its launch on 9 April 2010 by Ms. Ahlenius. This follows from ST/AI/371/Amend.1, the applicable Administrative Instruction at the time of the request for the management evaluation on 4 October 2010, and the OIOS Investigations Manual, which both, as opposed to ST/AI/371, clearly only refers to a single investigation

when a staff member is being investigated for a possible disciplinary matter and not several independent investigations, such as, for instance, a "preliminary" investigation followed by an independent "actual" investigation, as the Respondent appears to contend. The Tribunal notes, at the time when the Applicant filed his request for management evaluation, ST/AI/371/Amend.1 had already come into effect.

14. Accordingly, it does not follow that the claim is time-barred and therefore not receivable. If that were the case, the Tribunal would in effect be condoning any practice whereby the Administration conducts investigations in secret and denies the staff member the right of challenging such due process violations by sheltering behind the argument that, in the absence of receipt of notification and a request for management evaluation and irrespective of the harm inflicted on the staff member, the claim was not receivable.

15. It is clear that, at some point, the Administration went beyond a mere consideration as to whether a disciplinary investigation was appropriate when it sought suitable independent investigators to conduct an investigation and identifying the Applicant. The Respondent submits that this occurred on 9 April 2010 when Ms. Ahlenius launched the investigation. The fact that the Applicant first heard the rumour in or about 14 July 2010, but did not request management evaluation until 4 October 2010 does not necessarily mean that the request for management evaluation is time-barred. It was prudent on his part to wait for notification of the decision. It did not come. The rumours continued and increased in intensity until a point was reached when he decided that in order to protect his rights he should take the first step in the procedure for challenging the fact of his being secretly investigated for possible misconduct. When he did so on 4 October 2010, the response of the MEU, by letter dated 4 November 2010, was that there was no "ongoing" investigation, based on the information received from the Ethics Office. This was, in light of the Respondent's reply in this case, clearly not correct—

the decision to investigate the Applicant had clearly already been taken. It had just not yet been notified to the Applicant. The Respondent cannot now rely on his own default to deny the Applicant recourse to a judicial determination on the merits of the claim.

16. On the available documentary evidence, the Respondent has therefore failed to establish that the Applicant's request for management evaluation was not filed in a proper and timely manner. Consequently, the Tribunal finds that the claim is not time-barred.

Is the alleged decision to undertake a "secret and retaliatory" a contestable administrative decision?

17. The Respondent's contention is effectively that initiating an investigation is merely a step in the investigative process and not a separate administrative decision which the Tribunal is competent to review. The Statute of the Dispute Tribunal defines the jurisdiction and powers of the Tribunal and its art. 2.1(a) defines the type of administrative decision that the Tribunal may review as:

> … an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment. The terms "contract" and "terms of appointment" include all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged non-compliance.

18. Nothing in this definition appears to limit the Tribunal's authority in terms of considering an application from a staff member who wishes to appeal an administrative decision to launch a disciplinary investigation into her affairs, which, in addition to being procedurally flawed, may also be tainted by bad faith and/or ulterior motives. That the Tribunal may review such an application was also confirmed by the Appeals Tribunal in *Nwuke* 2010-UNAT-099 in which it stated that "a possible disciplinary procedure" would concern the rights of "the accused staff member" (para. 29).

19. Accordingly, the Tribunal finds that the contested administrative decision is an appealable administrative decision.

Conclusion

20. The Applicant's appeal against the decision to conduct an alleged "secret and retaliatory" investigation is receivable.

(*Signed*)

Judge Goolam Meeran

Dated this 22nd day of February 2013

Entered in the Register on this 22nd day of February 2013

(*Signed*)

Hafida Lahiouel, Registrar, New York