



Before: Judge Coral Shaw
Registry: Nairobi
Registrar: Abena Kwakye-Berko, Acting Registrar

von der SCHULENBERG

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Counsel for the Applicant:

Francois Lorient, Esq.

Counsel for the Respondent:

Stephen Margetts, ALS/OHRM, UN Secretariat

Steven Dietrich, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant has three separate applications before this Tribunal. They all relate to matters that arose during his employment as Executive Representative of the Secretary-General (ERSG) to the United Nations Integrated Peacebuilding Office (UNIPSIL) in Freetown, Sierra Leone in 2008 and at the end of that engagement.

2. The Respondent has alleged that the Applicant's claims in this Application are not receivable as the Applicant did not seek management evaluation of any of the decisions he is seeking to challenge and that the request for management evaluation that was submitted was out of time.

3. As both Parties have made their submissions in writing on the issue of receivability, the Tribunal has decided to determine it as a preliminary issue.

Background

4. The Applicant was appointed Executive Representative of the Secretary-General (ERSG) to UNIPSIL, in Freetown, Sierra Leone at the Assistant Secretary-General level in 2008. His fixed-term contract was periodically renewed.

5. In November 2010, a staff member at UNIPSIL (Complainant) complained of being harassed by her Chief of Section and Deputy Head of Mission. This complaint was publicised by the press in Freetown.

6. On 1 December 2010, the Complainant made a second complaint against the Deputy Head of Mission and, according to the Applicant, added a "few vague words of complaint" against the Applicant's own behaviour.

7. In December 2010, the Office of Internal Oversight Services (OIOS) initiated an investigation into leaks of confidential information allegedly made by the

Complainant. On the basis of information that had come his way on 12 February 2011, the Applicant says that in the course of this investigation, OIOS also conducted a secret misconduct investigation into the complaints against him and the Deputy Head of Mission.

8. On 9 May 2011, the Applicant wrote to the Under Secretary-General (USG) for OIOS complaining about the conduct of OIOS investigators who interviewed him. The USG/OIOS responded to this on 17 May 2011.

9. The Respondent denies that there were any investigations into the conduct of the Applicant or that the investigations, findings and reports relating to the Applicant were concealed.

10. On 3 January 2012, the Applicant repeated his complaints about the investigators in his comments on a draft OIOS audit report into UNIPSIL. The USG/OIOS replied on 6 January 2010.

11. The Applicant states that on 10 January 2012, he “was devastated” when he read copies of the memos dated 28-29 November 2011 sent by the Director of the Investigation Division/OIOS to the USG for the Department of Field Support (USG/DFS), implying that OIOS had been conducting misconduct investigations against him.

12. On the same day he received, by pouch, a letter dated 24 December 2011 from USG/DFS informing him that a complaint under ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority), had been submitted against him, which would be reviewed by DFS in conjunction with USG for the Department of Political Affairs (DPA).

13. On 22 January 2012, the Applicant submitted his response to the complaint under ST/SGB/2008/5 denying any wrong doing.

14. In February 2012, there were discussions about the Applicant's departure from Sierra Leone. On 1 February 2012, he wrote to the USG/DPA stating that he planned to leave Sierra Leone for good on 6 February 2012.

15. The Applicant's contract was due to expire on 8 February 2012. It was extended for a further three months to enable him to complete his end of assignment report and the administrative formalities for his retirement.

16. Both the Applicant and Respondent refer to the glowing remarks on his career achievements made by the Secretary-General when he left Sierra Leone.

17. By memorandum dated 18 October 2012, the Applicant, by now separated from the UN, was informed that there were insufficient grounds to initiate a fact-finding investigation under ST/SGB/2008/5 and the matter was now closed.

18. On 7 December 2012, the Applicant submitted a request for management evaluation of the "administrative decision to open a misconduct investigation against him." He did not request management evaluation of the decision to terminate his employment or the decision not to renew his appointment.

19. On 18 January 2013, the Applicant received a decision from the Management Evaluation Unit (MEU) dated 17 January 2013. It dismissed his request as time - barred.

The Application

20. On 15 August 2013, the Applicant filed an application with the Tribunal contesting the decision of the Under-Secretary General for Field Support (USG/DFS) to dismiss the complaint of harassment and abuse of authority made against him under ST/SGB/2008/5 and the finding that the Complainant had acted in good faith.

21. The Applicant claims that the Respondent's handling of the complaint against him allowed the Complainant's allegations to negatively affect the work atmosphere at UNIPSIL and damage his reputation, which in turn deprived him of a clear "contractual situation" and denied him "the new appointment expected from the Secretary-General in April 2012."

22. The Applicant describes the contested decision in the following terms:

A disguised disciplinary decision to suddenly terminate the Applicant without due process, based on undated, endless, directionless, groundless, never ending, repetitive, open ended, non-concluded investigation(s) harming the Applicants reputation, contractual rights and career prospect, including concealment of the OIOS/FSA disciplinary investigations procedure, findings and report.

23. He also names the officials who "made the implicit decision not to disclose the termination decision, the misconduct investigations and their final reports."

24. Under the heading "Author of the communication by which you were informed of the decision" the Applicant states "no written decision yet on the current procedures, status, closure and reports on investigations."

25. In relation to the date on which the decision was notified to him or when he first came to know about the decision, he states:

The MEU reply of 17 January 2013 is silent on the date of the decision to investigate him, and on disclosure of the OIOS/FSA investigations and reports.

26. The Respondent filed his Reply to the Application on 19 September 2013. The Respondent submits that the Application is without merit and should be dismissed as such.

Considerations

27. Pursuant to Article 8.1(ii) of the Statute of the Tribunal, an application challenging the termination of service for reasons relating to misconduct must be filed in the Tribunal within 90 days of the decision.

28. Except for applications which challenge an administrative decision imposing a disciplinary measure an applicant may bring a claim to the Tribunal only if it has been previously referred to the MEU for management evaluation within 60 days of the contested Administrative decision.¹

29. There are two contested decisions in this case.

i. Termination of Contract

30. The Applicant alleges that the decision to terminate his contract was a disguised disciplinary measure. In his submissions he cites the United Nations Appeals Tribunal (UNAT) decision in *Haniya*² in which UNAT stated that:

Where a termination of service is connected to any type of investigation of a staff member's possible misconduct, it must be reviewed as a disciplinary measure, because that is what it in reality is.

31. The Respondent submits that the Applicant's fixed term contract expired on 8 April 2012. The time limit for seeking management evaluation expired 60 days after that.

32. The date on which the decision not to renew the Applicant's appointment on its expiry was made has not been disclosed to the Tribunal. However, on the Applicant's own submission, he was made aware of the decision on 1 February 2012

¹ Staff rule 11.2(b).

² Judgment No. 2012-UNAT-024.

when he confirmed the date of his departure from Sierra Leone in writing. Certainly he was aware of the expiry when he was repatriated to his home country on 12 April 2012.

33. The time for seeking management evaluation of the decision not to renew his contract expired, at the latest, on 11 June 2012. The Applicant did not seek management evaluation of this decision.

34. If as alleged by the Applicant, his contract was terminated, and it was a disciplinary measure, then the time for filing his Application with the Tribunal was either 90 days from 1 February 2012, namely 1 May 2012 or 90 days from 12 April 2012, namely 12 July 2012. The Applicant did not file his application with the Tribunal until 13 August 2013.

35. Whether the Applicant's employment ended as an expiry/non renewal or as a termination for disciplinary reasons, the challenge to the expiry/termination of his contract is out of time and is not receivable.

ii. The Alleged Disciplinary Investigation

36. There is no evidence before the Tribunal to show that a disciplinary investigation was conducted against the Applicant. If, however, such an investigation did take place there is no evidence that it was concluded, and no evidence that a formal disciplinary measure was imposed against the Applicant as a result.

37. Annexes to the Application reveal that the Applicant was the subject of a complaint of harassment in 2010. He was advised belatedly, some months after his employment had ended, that there were insufficient grounds to initiate a fact-finding investigation under the ST/SGB/2008/5 and that the matter was now closed. On this evidence, it is clear that although an allegation had been made against the Applicant, it was not deemed worthy of an investigation of any sort.

38. The Applicant had actual knowledge of the harassment complaint on 10 January 2012 when he received the letter dated 24 December 2011 informing him of the complaint made under ST/SGB/2008/5. His 22 January 2012 response denying the complaint indicates that he was well aware of it by then.

39. The Applicant then had 60 days to seek management evaluation of the decision to review or investigate the complaint against him. His request for management evaluation was not made until 7 December 2012. It was out of time. As the Applicant did not make a timely request for management evaluation this Application to the Tribunal is not receivable.

Conclusion

40. The Application is dismissed.

(Signed)

Judge Coral Shaw

Dated this 24th day of December 2013

Entered in the Register on this 24th day of December 2013

(Signed)

Eric Muli, Officer-in-Charge, UNDT Nairobi