



Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

PRISACARIU

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVIBILITY

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Stephen Margetts, ALS/OHRM, UN Secretariat

Sarahi Lim Baró, ALS/OHRM, UN Secretariat

Introduction

1. On 2 April 2014, the Applicant, a Romanian National Police Officer formerly engaged, on a temporary basis, as a member of the United Nations Police Force (“UNPOL”) at the United Nations Integrated Mission in Timor-Leste (“UNMIT”), filed an application contesting the non-renewal of his assignment with UNPOL. The Applicant states that he was informed in mid-March 2014 by the Romanian authorities, namely the Romanian Ministry of Internal Affairs, that he had been found guilty of “assault and destruction” and that his “tour of duty [was] considered ended on disciplinary grounds”. Furthermore, he was told by the Romanian authorities that he would not be accepted for any other UNPOL assignments.

2. The application was transmitted to the Respondent in accordance with art. 8.4 of the Rules of Procedure on 3 April 2014. On 15 April 2014, the Respondent filed a motion for summary judgment contending that the Tribunal had no jurisdiction over the matter and that the application was not receivable, since the Applicant was engaged as a member of UNPOL and not a staff member of the United Nations. This motion was followed by a supplementary submission to the motion for summary judgment, contending that the Applicant had not submitted to the requisite request for management evaluation, thus further rendering the application not receivable. The Respondent submits that, there being no dispute on the salient facts of the case, and the law being clear, the application should be summarily dismissed.

Background

3. The Applicant states that, on the evening of 11 August 2011, he and two of his fellow officers attended a concert in Dili, East Timor. After the concert, as they were walking towards their vehicle, they were pelted with rocks, following which there was an incident between one of the Applicant’s colleagues and a Timorese taxi driver who sustained a broken mirror due to the rock-throwing. The Applicant states

that the rock-throwing was a common encounter in the line of duty, and officers were wary of this type of incident, because it had become a “local custom to frame an international [person] in order to ask money from UN”. The Applicant’s direct supervisor (of Spanish origin), who had been injured, and the UNPOL District Commander (of Portuguese origin) ordered the officers to leave the scene, advising that they would report the incident, which they did.

4. The Applicant states that some 51 days after the incident, in late September 2011, he was interviewed by a “PSDO officer”, who informed him that he was the subject of an internal investigation for allegedly failing to report the incident. The Applicant states that he was never informed that he was suspected or being charged with assault or destruction. The Applicant tendered a statement and also offered witnesses, if needed. Thereafter, he heard nothing further about the investigation. A month later the Applicant commenced his second extension of contract and was promoted as Officer-in-Charge of Moris Foun Police Post, achieving appraisals of “exceeding expectations” from the very same Portuguese District Commander present at the scene at the time of the incident, and two further commendations for his contribution to the Mission. He remained in the Mission for seven more months without hearing anything further about the incident. The Applicant states that he also has a confirmation from the prosecutor’s office in Dili, East Timor, that the criminal case against his colleague was closed as there was no evidence of wrongdoing on the part of the UNPOL officers. He contends that the decision of an independent Timor-Leste judicial authority is “more credible than an administrative matter conducted with obviou[s] unprofessionalism”.

5. The Applicant contends that the finding of the Romanian authorities that he was guilty of assault and destruction some two-and-a-half years after the incident, has, *inter alia*, breached his rights to a fair and impartial investigation, and on the basis of unfounded assumptions, prejudiced his rights to a further career with other UNPOL missions.

6. The Respondent contends that the application is not receivable *ratione personae* because the Applicant is not a staff member and cannot invoke the jurisdiction of the Tribunal since UNPOL is an international law-enforcement entity separately administered outside of the UN Secretariat. In terms of ST/SGB/2002/9 (Regulations Governing the Status, Basic Rights and Duties of Officials other than Secretariat Officials, and Experts on Mission), the Applicant is deemed to be an expert on mission and not an official of the United Nations. UNPOL officers do not receive a letter of appointment with the United Nations and, even though the Applicant remains accountable to the Organization for the proper discharge of his functions, he remains under the jurisdiction of his own country.

7. The Respondent relies on *El Moctar* UNDT/2012/113, in which an UNPOL officer contested the decision of the UNPOL Commissioner of the United Nations Organization Stabilization Mission in the Democratic Republic of Congo (“MONUSCO”) to impose a sanction of reprimand and to place a note in his personnel file. The Dispute Tribunal held that the applicant in that case was not a staff member of the United Nations and thus had no means of challenging a disciplinary sanction imposed during his service with UNPOL. Furthermore, the Respondent submits that matters arising from the Romanian government’s decision not to renew the Applicant’s assignment as an UNPOL officer on disciplinary grounds clearly fell within the purview of the Romanian authorities and not the Secretary-General of the United Nations. The Respondent states that, as there is no dispute as to the material facts in the case, the Applicant being an UNPOL officer and not a UN staff member, the Tribunal should determine the issue of receivability as a matter of law and issue a summary judgment in the interests of judicial economy by considering receivability as a preliminary issue.

8. On 21 April 2014, the Applicant filed a submission in response to the Respondent’s reply, stating, *inter alia* (emphasis in original):

1. I'm not contesting a decision of Romanian Authority but an unlawful UN decision that breached my elementary rights and affects me. I'm not seeking for compensation; I'm looking just to clear my name and the image of Romanian Police Force.

2. Regarding the fact that I'm not considered a staff member, I would like to raise the following issue: if I'm not a staff member how come I can be the subject of an UN investigation and how come an UN disciplinary measure can be imposed upon me? UNPOL officers are serving with UN, are following UN's rules and procedures, so, unless UNPOL's are considered 2nd class persons, how it is possible to claim that I'm not allowed to contest a UN disciplinary decision? This shows me that I'm clearly discriminated (please see art. 7 THE UNIVERSAL DECLARATION OF HUMAN RIGHTS) because I don't have the right to contest a UN decision, although art. 10 and 11 of THE UNIVERSAL DECLARATION OF HUMAN RIGHTS gives me this fundamental right.

3. If I'm serving with UN, if I'm found guilty by a body of UN in a disciplinary case, then *de lege ferenda* I should be allowed to contest the UN decision to UN Dispute Tribunal.

Consideration

Request for summary judgment

9. Although the Respondent has raised issues of receivability, it is contended that the application may be summarily dismissed under art. 9 of the Rules of Procedure.

10. Article 9 of the Tribunal's Rules of Procedure provides that a party may move for summary judgment when there is no dispute as to the material facts of the case and a party is entitled to judgment as a matter of law. The Dispute Tribunal may determine, on its own initiative, that summary judgment is appropriate.

11. The appropriateness of an application for summary judgment was discussed in *Cooke* UNDT/2011/216, wherein the Tribunal indicated that if the receivability of a case is being challenged, the Tribunal cannot determine the facts of the application on the merits or even consider whether such facts are common cause or contested,

highlighting that summary judgment is a judgment on the merits and a party cannot ask for it if the full facts have not been pleaded. The Tribunal found the appropriate procedure would be to deal with the matter as a receivability issue. (*Cooke* UNDT/2011/216 was subsequently vacated in *Cooke* 2012-UNAT-275, in which the Appeals Tribunal found that the application was not receivable, but made no pronouncements regarding the Dispute Tribunal's observations regarding the nature of a summary judgment.)

12. The contextualization of an application for summary judgment, whilst determined by individual jurisdictional experience and familiarity, will also no doubt entail some general principles commonly adopted in multiple jurisdictions with a view to expediting proceedings where facts are not in dispute and the law is clear. A cursory overview of common law jurisdictions is indicative of the position that summary judgment is normally granted on the filing of affidavits on substantive claims, and is not a procedure normally used for disposal of matters on receivability or admissibility. Whatever nomenclature is given to the process is, to my mind, not material, as the Tribunal has dealt with matters summarily by striking out or dismissal on the grounds of vexatiousness, frivolity, abuse of process, manifest inadmissibility, failure to disclose cause of action, and so on.

13. Whilst, in fairness to all parties, it is the practice of the Dispute Tribunal to deal with cases in chronological order of filing, the General Assembly has requested in its resolution 66/237, adopted on 24 December 2011, that the Dispute Tribunal and the Appeals Tribunal review their procedures in regard to the dismissal of "manifestly inadmissible cases". It is a matter of record that the Dispute Tribunal, even prior to the aforesaid resolution 66/237, entertained and continues to deal with matters of admissibility or receivability on a priority basis in appropriate cases, and also render summary judgments in appropriate cases under art. 9 of the Rules of Procedure. However, any application for dismissal of cases that appear manifestly inadmissible or devoid of merit have to be dealt with on a case-by-case basis bearing in mind the wise words of Megarry J in *John v. Rees* [1970] Ch 345 at 402 (U.K.):

As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change.

14. In the instant case, the Applicant faces several preliminary hurdles with respect to the Tribunal's jurisdiction over his application.

Contested decision

15. Articles 2.1(a) and (b) of the Tribunal's Statute state:

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 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;

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

16. In his submission of 21 April 2014, the Applicant stated that he was "not contesting a decision of Romanian Authority but an unlawful UN decision that breached [his] elementary rights and affect[ed] him". However, in his application he clearly states that he "was informed by Romanian authorities that [he] was found guilty for 'assault and destruction', together with [VN] and [RA]" and that the same authorities informed him that his "tour of duty is considered ended on disciplinary grounds and [he] won't be accepted to any UN missions".

17. Thus, the decision that he seeks to contest was made and communicated to him by the relevant Romanian authorities. Notably, the Applicant did not attach to

his application or the submission of 21 April 2014 any documents to suggest that any administrative or disciplinary decision in relation to him as a staff member was made by the United Nations Administration, the Secretary-General or his duly delegated officers.

18. As the contested decision was made by the Romanian Ministry of Internal Affairs, the present application is not receivable under art. 2.1 of the Tribunal's Statute.

Applicant's status

19. Article 3.1 of the Tribunal's Statute states:

Article 3

1. An application under article 2, paragraph 1, of the present statute may be filed by:

(a) Any staff member of the United Nations, including the United Nations Secretariat or separately administered United Nations funds and programmes;

(b) Any former staff member of the United Nations, including the United Nations Secretariat or separately administered United Nations funds and programmes;

(c) Any person making claims in the name of an incapacitated or deceased staff member of the United Nations, including the United Nations Secretariat or separately administered United Nations funds and programmes.

20. In order to invoke the jurisdiction of the Tribunal, therefore, an applicant must be a staff member, former staff member or person making a claim in the name of an incapacitated or deceased staff member. The Respondent contends that the Applicant does not have a letter of appointment with the United Nations and has not been employed as a United Nations staff member. As stated by the Tribunal (Judge Boolell) in *El Moctar* UNDT/2012/113, "[a]lthough their operational activities are controlled by the United Nations, it is clear that UNPOL officers are kept at arm's length from the Organization, remaining part of their national police

contingent, and supplied and equipped by their Member State” (para. 33).

In *El Moctar*, the Tribunal also stated (footnotes and emphasis omitted):

26. The “Guidelines on United Nations Police Officers on Assignment with Peacekeeping Operations” (the “Guidelines”) which set out the ‘General Conditions of Service of United Nations Police Officers’, defines them as:

... police or other law enforcement personnel assigned to serve with the United Nations on secondment by Governments of Member States at the request of the Secretary-General.

27. All UN Police Officers, including the Applicant, are made to sign an undertaking which requires them to agree to comply with the Regulations set out in ST/SGB/2002/9. Upon his arrival at MONUSCO, the Applicant signed an Undertaking and Declaration as an “expert on mission” in which he acknowledged that he understood ST/SGB/2002/9 and agreed to be bound by all mission standard operating and administrative procedures, policies, directives, and other issuances.

...

32. UNPOL officers are commanded by the Head of the Police Component, who is appointed by the Secretary-General and “has the authority over and responsibility for all United Nations police activities within the mission area in support of the mission mandate” and “all personnel serving within the mission must follow all lawful instructions received from the Head of Mission”. Furthermore, “United Nations Police Officers shall not accept instructions from sources external to the United Nations”.

21. The Respondent’s submission that the Applicant is not a staff member and has no letter of appointment with the Organization stands unrebutted. The Applicant did not attach any records to his application of his submission of 21 April 2014 showing that he belongs to the category of persons who may file applications with the Dispute Tribunal contesting their terms of appointment with the Organization.

22. Accordingly, this matter is clearly not receivable due to the Applicant’s lack of standing before the Tribunal (see also *Basenko* UNDT/2010/145 (affirmed in *Basenko* 2011-UNAT-139); *di Giacomo* UNDT/2011/168 (affirmed in *di Giacomo*

2012-UNAT-249); *El Issawi* UNDT/2012/038; *El Moctar* UNDT/2012/113; *Ur Rehman* UNDT/2012/182).

23. In all the circumstances, this matter is clearly not receivable and stands to be to be dismissed.

Observation

24. In *di Giacomo* UNDT/2011/168, the Tribunal made the following observation:

46. Where rights and obligations attach, there must be an effective mechanism for resolution of disputes and for reparation of breached rights through appropriate remedies (see *Gabaldon* 2011-UNAT-120 and *Bertucci* 2011-UNAT-121, referring to “the right to an effective remedy”). The Tribunal notes, in this regard, the Universal Declaration of Human Rights, which refers to “the right to an effective remedy” and states that “[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial Tribunal, in the determination of his rights and obligations ...” (see arts. 8 and 10), as well as the International Covenant on Civil and Political Rights (1966), which refers to access to “an effective remedy” (art. 2.3(a)), encourages the development of “the possibilities of judicial remedy” (art. 2.3(b)), and provides that “[i]n the determination ... of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law” (art. 14.1).

25. The Tribunal is unable to assist the Applicant, and it would be unfortunate if he were to be left without a remedy. However, although the Tribunal is not the proper forum for the Applicant to raise his grievance arising from the March 2014 decision relating to his service with UNPOL, the Applicant may not have exhausted all remedies that may be available to him. The Applicant has indicated that no criminal findings were made against him in a court of competent jurisdiction in Timor-Leste. However, he has not indicated whether he has availed himself of remedies that may be available in the country of his domicile, or within the applicable jurisdiction, for instance either in a civil court or criminal court.

Conclusion

26. There being no challengeable administrative decision within the meaning of art. 2.1 of the Tribunal's Statute, and the Applicant not being a staff member and therefore having no standing before the Tribunal under art. 3.1 of its Statute, this matter is not receivable. The application is accordingly dismissed.

(Signed)

Judge Ebrahim-Carstens

Dated this 23rd day of April 2014

Entered in the Register on this 23rd day of April 2014

(Signed)

Hafida Lahiouel, Registrar, New York