



Before: Judge Alessandra Greceanu

Registry: New York

Registrar: Hafida Lahiouel

BIEN-AIMÉ

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

ON RECEIVABILITY

Counsel for Applicant:

Miles Hastie, OSLA

Counsel for Respondent:

Stephen Margetts, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant contests the decisions to reassign him from the Personnel Section to the Security Section in the United Nations Stabilization Mission in Haiti (“MINUSTAH”), and the removal of his computer’s hard drive during the course of an investigation without providing him with a copy it.

Facts

2. On 26 May 2011, the Applicant received a memorandum from the Chief of the Mission Support (“CMS”), MINUSTAH, dated 25 May 2011, informing him, along with four other staff members being investigated by the Office of Internal Oversight Services (“OIOS”), that senior management had taken a decision, which had to be implemented as soon as possible, to deploy them to other sections within MINUSTAH for the purpose of “staff development”.

3. On 30 May 2011, the CMS held a meeting with the Applicant in the presence of the President of the National Staff Union and an Administrative Assistant, CMS, during which he was informed that the 25 May 2011 decision to reassign him to the Security Section, as well as the removal of his hard driver, were due to an ongoing investigation being conducted by OIOS.

4. On 20 July 2011, an Officer from the Regional Ombudsman’s Office, United Nations Ombudsman & Mediation Services (“Office of the Ombudsman”) contacted the Applicant via email to

follow-up on [their] telephone conversation at the beginning of July. At that time, [they] discussed [the Applicant’s] concerns about the legality of both [his] lateral transfer and the seizure of the hard drive from [his] computer. [They] discussed, one way to test those concerns [was] to get advice from the Staff Council and/or [the Office of Staff Legal Assistance]. ... I do not know if you have made any inroads in any of those issues and if I can be of any further assistance. I would be glad to able to assist you if you need so.

5. On 4 August 2011, the Office of the Ombudsman contacted the Applicant inquiring as to a good time for them to talk. The Applicant responded on 5 August 2011 that he could be reached that day.

6. On 4 August 2011, the Applicant requested management evaluation of the decision to “transfer [him] to the Security section at MINUSTAH”. The Applicant indicated as part of his request for management evaluation that he became aware of the contested decision on 26 May 2011 and that he “immediately approached the ombudsman, and was still working with the ombudsman’s office to resolve the issue as of 1 July 2011”. The Applicant’s also stated that “further particulars [were] to follow”.

7. On 15 August 2011, the Management Evaluation Unit (“MEU”) informed the Applicant that, considering that in his 4 August 2011 email submitting his request for management evaluation he had advised them that the subject matter of his request was now being pursued through the Office of the Ombudsman, his case would be held “in abeyance pending the conclusion of the informal resolution process ...”. The MEU requested that the Applicant inform them, within two weeks from the date on which the informal resolution process with Office of the Ombudsman is completed, whether he wanted to continue with his request for a management evaluation. The MEU’s letter further stated that “[n]otwithstanding the foregoing acknowledgement of receipt of [the Applicant’s] request for management evaluation, the Secretary-General expressly reserves the right to raise the issues of receivability and competence, as deemed appropriate”.

8. On 19 August 2011, the Applicant filed an updated request for management evaluation with the “further particulars” referred to in his 4 August 2011 request for management evaluation. The Applicant also stated that he had “been in contact with the Office of the Ombudsman in informal efforts to resolve his case. He stopped working with the ombudsman on 5 August 2011”. The updated request for management evaluation reasserted that the decision being contested was to reassign the Applicant to the Security Section. However, as part of the explanation as to which

of his rights had been violated by the decision, the Applicant also expressed that the removal of his hard drive during the OIOS investigation had been completed without his authorization in breach of his rights.

9. On 20 September 2011, the MEU sent an email to the Applicant stating that they noted that the Applicant's case had come out of abeyance on 19 August 2011 but that due to delays they had not been able to follow-up on the case and were therefore "asking for [the Applicant's] kind consent to postpone the issuance of the MEU letter in [his] case to 13 October 2011 (instead of 3 October). That same day the Applicant responded that "he agree[d] to the extension of the MEU deadline to 13 October 2011", instead of 3 October 2011.

10. By letter dated 14 October 2011, the Secretary-General informed the Applicant that he had decided to accept the MEU's recommendation to uphold the contested decision. The Applicant was further advised that "[a]ny recourse in respect of this decision may be addressed to the [Dispute Tribunal] in accordance with Staff Rule 11.4. The Secretary-General expressly reserves the right to raise the issue of receivability at any subsequent hearing of this matter".

11. The Applicant appealed the Secretary-General's decision on 7 December 2011. The Respondent submitted his reply on 9 January 2011. By Order No. 345 (NY/2013), dated 17 December 2013, the Tribunal ordered the parties to express, *inter alia*, their views regarding the receivability of the application in light of the staff rule 11.2(c) and art. 8.1(c) of the Dispute Tribunal's Statute. The parties filed their responses on 7 February 2014.

12. In his response to Order No. 345, the Applicant submitted that he contacted the Office of the Ombudsman on 24 June 2011 in an attempt to informally resolve this matter and that these efforts were ongoing until 5 August 2011. The Applicant further stated that by informing the Applicant on 15 August 2011 that his case would be held in abeyance, the MEU recognized the informal resolution efforts being conducted by the Office of the Ombudsman. Finally, the Applicant further stated that,

under staff rule 11.2(c), management evaluation deadlines may be extended pending informal resolution with the Office of Ombudsman and they can also be extended or waived by the Administration. The Applicant concluded his response to Order No. 345 by stating that the deadline in his case “were so waived or extended here”.

13. In his response to Order No. 345, the Respondent stated that the application was not receivable because the parties were not engaged in informal resolution efforts and the MEU did not waive the deadline by which the request for management evaluation had to be filed.

Consideration

14. Under art. 2.6 of its Statute, the Dispute Tribunal is competent to review *ex officio* whether it has competence or jurisdiction to consider an application, even if the parties do not raise the issue, seeing that it is a matter of law and the Dispute Tribunal’s Statute prevents it from reviewing cases that are not receivable (see *Christensen* 2013-UNAT-335 and *Chahrour* 2014-UNAT-406).

15. As results from the uncontested 20 July 2011 email, the Office of the Ombudsman informed the Applicant, prior to his requesting management evaluation, that one way to address his concerns was to seek advice from the Staff Council and/or OSLA. With regard to the fact that the Applicant was unaware of the potential irregularities that might have led to OIOS’ ongoing investigation, he was advised that a suitable course of action could be to approach the official responsible and inquire about the possible charges.

16. Staff rule 11.1 (ST/SGB/2011/1) dated 1 January 2011 states:

(a) A staff member who considers that his or her contract of employment or terms of appointment have been violated is encouraged to attempt to have the matter resolved informally. To that end, a staff member who wishes to pursue informal channels should approach the Office of the Ombudsman without delay, without prejudice to the right to pursue the matter formally in accordance with the provisions of the present chapter.

(b) Both the staff member and the Secretary-General may initiate informal resolution, including mediation, of the issues involved at any time before or after the staff member chooses to pursue the matter formally.

(c) The conduct of informal resolution by the Office of the Ombudsman, including mediation, may result in the extension of the deadlines applicable to management evaluation and to the filing of an application with the United Nations Dispute Tribunal, as specified in staff rules 11.2 (c) and (d) and 11.4 (c) below.

17. In accordance with staff rules 11.2(a) and (c) on management evaluation, a staff member wishing to formally contest an administrative decision alleging non-compliance with his/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 a request for a management evaluation of the contested decision to the Secretary-General in writing within 60 calendar days from the date on which the staff member received notification of the administrative decision. This deadline may only be extended by the Secretary-General pending efforts for informal resolution conducted by the Office of the Ombudsman, under conditions specified by the Secretary-General (staff rule 11.2(c)).

18. The Tribunal considers that an extension of the time limit to file a request for management evaluation does not occur automatically and can only be actioned:

a. During the pursuit of genuine informal resolution and/or mediation through the Office of the Ombudsman; and

b. At the initiative of the Secretary-General through a reasoned decision which can be separate or included in his response to the management evaluation request or at the initiative of the staff member through a diligent and reasoned request addressed to the Secretary-General which can be filed separately before the expiration of the time limit for requesting management evaluation or together with the management evaluation request. The Secretary-General is the only entity vested with the authority to extend or

suspend the deadline by which a staff member is required to file a request for management evaluation

19. Based on the evidence before it, including the Applicant's request for management evaluation and application with the Tribunal, the Applicant was notified of the contested decision on 26 May 2011 and any request for management evaluation of this decision should have been filed within 60 calendar days—by 26 July 2011. However, the Applicant's request for management evaluation was not filed until 4 August 2011, after the expiration of the applicable time limit.

20. In July 2011, the Applicant contacted the Office of the Ombudsman, however, as results from the 20 July 2011 email exchange between the Applicant and the Ombudsman, no informal negotiations took place prior to 26 July 2011, the date by which the 60-day period to request management evaluation expired. The 20 July 2011 email exchange only served the purpose of informing the Applicant of some of the legal steps necessary to formally contest the decision and to obtain more details regarding the charges being investigated by OIOS and cannot be considered part of any official informal resolution efforts.

21. The Tribunal considers that there is no evidence of further informal efforts having been conducted after the receipt of this email. Further, the Applicant indicated in his updated 19 August 2011 management evaluation request that he did not contact the Ombudsman after 5 August 2011. Consequently, there were no real ongoing informal resolution efforts that took place between the date on which the Applicant was notified of the decision on 26 May 2011 and when he filed his request for management evaluation on 4 August 2011, later updated on 19 August 2011.

22. When considering the waiver and/or suspension of an already running time limit, the Dispute Tribunal has no legal authority to consider that the 60-day limitation period to request management evaluation commences at the end of informal resolution efforts conducted by the Office of the Ombudsman rather than from the date on which the Applicant was notified of the contested decision. More

importantly, the deadline for filing a request for management evaluation pending informal resolution efforts conducted by the Office of the Ombudsman may generally only be extended by the Secretary-General under the terms of staff rules 11.1(a), 11.1(b) and 11.2(c) (see *Wu* 2013-UNAT-306 and *Egglesfield* 2014-UNAT-402).

23. The Applicant did not, prior to the expiration of the deadline of 26 July 2011, by which he was required to request management evaluation of the contested decision, or as part of his filings with the MEU, request that the Secretary-General extend or waive the deadline by which he was required to file his request for management evaluation.

24. It is clear from the 15 August 2011 MEU's letter, and from the Secretary-General's 14 October 2011 letter, that at no time was the deadline for filing a request for management evaluation extended at the initiative of the Secretary-General. This is further evidenced by the Secretary-General's conclusion from 14 October 2011 that he reserved the right to raise the issue of receivability during any potential appeal proceedings before the Dispute Tribunal.

25. The Tribunal concludes that the 4 August 2011 request for management evaluation request, including the updated 19 August 2011 request, were filed after the expiration of the applicable time limit and the deadline was not extended.

26. The Applicant's appeal was filed on 7 December 2011, within the 90-day time limit from the 14 October 2011 response of the MEU to the Applicant's request for management evaluation.

27. Article 8.1 of the Dispute Tribunal's Statute states that the Tribunal only has jurisdiction to hear and pass judgment on an application filed by an individual when the Applicant has previously submitted the contested administrative decision for management evaluation, where required. In the present case the management evaluation request was filed after the expiration of the time limit. The time limit was not extended under conditions specified in staff rule 11.2(c). The request for

management evaluation was therefore time-barred in front of the MEU and the present application is not receivable *ratione materiae*.

Conclusion

In the light of the foregoing the Tribunal DECIDES,

28. The application is rejected as not being receivable *ratione materiae*.

(Signed)

Judge Alessandra Greceanu

Dated this 27th day of June 2014

Entered in the Register on this 27th day of June 2014

(Signed)

Hafida Lahiouel, Registrar, New York