



Before: Judge Goolam Meeran

Registry: New York

Registrar: Hafida Lahiouel

TERRAGNOLO

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Alan Gutman, ALS/OHRM, UN Secretariat

Elizabeth Gall, ALS/OHRM, UN Secretariat

Introduction

1. The Applicant filed his appeal on 31 May 2014. The application did not meet the page limit requirement and included an excessive volume of documents (over 800 pages of annexes).

2. The Applicant was requested to comply with the page limit requirement specifically indicated on the application form available on the Tribunal's website. In response, on 7 June 2014, the Applicant split his original appeal into two separate claims that still did not meet the page limit requirement.

3. However, on an exceptional basis, the Tribunal instructed the Registry to register the two claims. The first claim, which deals with the decision of the Office for Human Resources Management ("OHRM") of 20 January 2014, was registered under Case No. UNDT/NY/2014/045. The second claim, which is the subject matter of this judgment, concerns the alleged "[f]ailure to investigate the administrative decision impugned in UNDT/NY/2014/045 under ST/SGB/2008/5". It was registered as Case No. UNDT/NY/2014/046.

4. On 9 June 2014, the application was served on the Respondent and a reply was received on 9 July 2014.

Findings of fact

5. On 30 December 2012, the Applicant asked OHRM to grant him an exception so as to allow him to apply for positions more than one level above his grade, G-4. On 20 January 2014, OHRM notified him that the request was denied.

6. On 14 March 2014, the Applicant requested OHRM to investigate the decision of 20 January 2014 which he alleged constituted both an abuse of authority and retaliation against him.

7. On the same day, the Applicant received an automated response informing him that the recipient of his email was out of the office until 17 March 2014. The notification indicated that urgent matters may be referred to two other individuals. The Applicant re-submitted his request of 14 March to one of these individuals. He received another automated response notifying him that this recipient was also out of office, until 24 March 2014.

8. On 28 March 2014, prior to receiving a response from OHRM, the Applicant requested management evaluation of OHRM's failure to give him a decision. On 10 April 2014, the Management Evaluation Unit dismissed the Applicant's request.

9. On 25 April 2014, Ms. Catherine Pollard, the Assistant Secretary-General ("ASG"), OHRM, notified the Applicant that the decision relating to his request that an exception be made to allow him to apply for posts more than one grade above his own did not appear to be tainted by any extraneous considerations. Accordingly, she did not consider that an investigation into this matter was warranted.

Consideration

10. Pursuant to art. 2(1)(a) of the Dispute Tribunal's Statute, the Tribunal is competent to hear and pass judgment on an application contesting an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment of a staff member.

11. The jurisprudence of the United Nations Appeals Tribunal ("UNAT") makes it clear that the absence of a response on the part of the Administration to a staff member's request may, in certain circumstances, constitute a denial of that request. This would constitute an appealable administrative decision since it may amount to an implied unilateral decision with direct legal consequences (*Tabari* 2010-UNAT-030; 2011-UNAT-177). However, an applicant may not unilaterally determine the

date of the decision when faced with the silence of the Administration (*Rosana* 2012-UNAT-273).

12. The question to be considered by the Tribunal is whether the delay of ten working days on the part of OHRM in communicating a decision to the Applicant could reasonably and sensibly be construed as an implied decision on the part of the Administration to deny the Applicant's request. The Tribunal notes that in *Tabari*, two months had elapsed before it was considered that the silence of the administration constituted an implied refusal.

13. Section 5.14 of ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority) states that “[u]pon receipt of a formal complaint or report, the responsible official will *promptly* review the complaint or report to assess whether it appears to have been made in good faith and whether there are sufficient grounds to warrant a formal fact-finding investigation” (emphasis added).

14. What constitutes a prompt reply is not defined but common sense dictates that it must refer to a reasonable period in the circumstances of a particular complaint. Having received two out of office notifications in relation to his email to OHRM dated 14 March 2014, the Applicant filed a request for management evaluation on 28 March 2014.

15. The absence of a response by OHRM, during a delay of ten working days between the Applicant's request on 14 March 2014 to carry out an investigation and his request for management evaluation on 28 March 2014, could not reasonably and sensibly be considered as an implied unilateral decision. It could also not be construed as a failure to act promptly in accordance with ST/SGB/2008/5. This begs the question as to why the Applicant should have initiated these proceedings.

16. The Tribunal finds that the absence of a response within ten working days does not constitute an appealable administrative decision and that the request for management evaluation was premature. There was in fact no decision at the time.

17. The Tribunal notes that the actual decision by the ASG/OHRM, in response to the Applicant's request for an investigation was notified to the Applicant on 25 April 2014. Notwithstanding this, the Applicant filed his application before the Tribunal on 31 May 2014 without requesting management evaluation of that decision and without taking into account the detailed explanation provided in Ms. Pollard's letter of 25 April 2014.

18. It is not clear whether the Applicant is labouring under the misapprehension that his previous request, dated 28 March 2014, made prior to his receipt of the administrative decision, was sufficient to meet the mandatory requirement under the Staff rules and the Tribunal's Statute and Rules of Procedure. Even if he had made such an assumption, he is mistaken because at the time of his request for management evaluation, there was no decision against which an appeal could have been filed.

19. Accordingly, the Tribunal has no jurisdiction to consider the appeal against the decision of 25 April 2014 since the Applicant failed to comply with the mandatory requirement of article 8.1(c) of the Tribunal's Statute and staff rule 11.2(a) to request management evaluation of the contested decision.

Applicant's conduct of proceedings

20. The Tribunal is concerned at the manner in which the Applicant has conducted these proceedings.

21. Article 10.6 of the Tribunal's Statute states:

Where the Dispute Tribunal determines that a party has manifestly abused the proceedings before it, it may award costs against that party.

22. Costs may be awarded against an applicant who presents a frivolous claim before the Tribunal (*Ishak* 2011-UNAT-152).

23. In assessing whether the Applicant's claim is frivolous and, if so, whether the making of such a claim amounts to an abuse of process, the Tribunal takes note of the fact that the Applicant is no stranger to the Tribunal's procedures, having filed five applications before the Dispute Tribunal and appealed four judgments before the United Nations Appeals Tribunal in the past 36 months.

24. By no stretch of the imagination could he reasonably have construed the Appeals Tribunal's ruling in *Tabari* as sanctioning the filing of a request for management evaluation, followed by a claim to the Tribunal, on the basis of an implied decision after a delay of only ten working days.

25. The Applicant has filed a huge volume of unnecessary documents and has taken up time and resources which could have been expended in dealing with the cumulative backlog of cases. Such conduct amounts to an improper use of the proceedings before the court. There can be no doubt that the Applicant knew or ought reasonably to have known that step one in the process is to receive an administrative decision. Step two is to submit that decision, where appropriate, to a management evaluation. Step three is to file a reasoned application before the Tribunal within the applicable time limit.

26. On 29 April 2014, the Management Evaluation Unit informed the Applicant that his previous request for management evaluation of the implied refusal of OHRM was not receivable as there had not been an administrative decision which may be the subject of management evaluation. Notwithstanding this clear indication, the Applicant filed his application, without complying with step two of the process, even though he actually received an explicit and fully argued decision from the ASG on 25 April 2014, a month prior to submitting his application.

27. The Applicant has filed a huge volume of documents in support of a claim that is frivolous. The Tribunal finds that the manner in which the Applicant has conducted these proceedings amounts to an abuse of process for which an order of costs under art. 10.6 of the Statute is appropriate.

Conclusion

28. The application is rejected;

29. The Applicant is ordered to pay costs in the sum of USD 1,500 for abuse of process.

(Signed)

Judge Goolam Meeran

Dated this 25th day of July 2014

Entered in the Register on this 25th day of July 2014

(Signed)

Hafida Lahiouel, Registrar, New York