



Before: Judge Coral Shaw

Registry: Nairobi

Registrar: Abena Kwakye-Berko

BIRYA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON REMEDIES

Counsel for the Applicant:

Self-represented

Counsel for the Respondent:

Katya Melliush, UNON

Alan Gutman, UNON

Introduction

1. The Applicant is a staff member at the United Nations Office at Nairobi (UNON) employed as a Security Officer in the Department of Safety and Security (DSS).
2. In an Application to the Tribunal dated 5 May 2014, he challenged the delay in commencement of a fact-finding exercise by a panel set up by the Director-General of UNON, pursuant to ST/SGB/2008/5 (Prohibition of discrimination, harassment, and abuse of authority), to investigate his complaint and the panel's failure to make a determination and/or to publish its report.
3. On 25 August 2014, the Tribunal issued *Birya* UNDT/2014/113 in which it stated that :

The Tribunal finds that the ST/SGB/2008/5 requirement for the administration to act promptly on complaints of prohibited activity has not been observed in the case of the Applicant's complaint. It notes that explanations for the delay by the panel up to May have been given to the Applicant who said in December 2013 that he had no issue with the delay. To an extent that mitigates the breach.

33. Before making a decision on what remedies, if any, that the Applicant is entitled to arising from this non observance, the Tribunal requires more information on the present state of the process and in any event finds that this is a case that is suitable to remand for institution or correction of the required procedure.

The Tribunal concluded:

As such, a remand requires the concurrence of the Secretary-General, the Tribunal will suspend the proceedings to enable the Secretary-General to consider his position and advise the Tribunal accordingly.

ORDER

37. The proceedings are suspended until 5 September 2014.

38. By 5 September 2014 the Secretary-General is to advise the Tribunal:

- a. of the present position of the investigation into the Applicant's complaint of prohibited conduct dated 13 February 2013;

b. if he concurs with the remand of this case for institution and correction of the procedure under ST/SGB/2008/5.

4. The Respondent replied to these orders on 5 September. He declined to concur with the remand of the case under the provisions of art. 10.4 of the Statute of the Dispute Tribunal on the grounds that the judgment made a number of determinations on the merits of the Applicant's claims.

5. The Respondent also provided the Tribunal with an update on the progress of the investigation into the Applicant's complaints of prohibited activity.

6. In summary, the Respondent advised that a draft report of the fact-finding panel records the interviews of 31 interviews and will be updated as testimony is received and reviewed. The panel has continued to conduct interviews throughout July and will interview five additional witnesses over the next three weeks. It will issue a draft report to the Director-General of UNON for her to take the action prescribed in section 5.18 of ST/SGB/2008/5 when it has completed its investigations.

Remedies

7. In view of the response from the Respondent, the remaining issue for the Tribunal to consider in this case is what, if any remedies should be awarded to the Applicant as a result of the breach of the requirement for the Administration to act promptly on the complaint of prohibited conduct.

Applicant's submissions

8. In his Application, the Applicant requests the Tribunal:

- a. To find that it has taken the fact-finding panel an inordinately long delay to publish its report;
- b. To find that the inordinate long delay constitutes a breach of duty.
- c. To find that the panel is in violation of his due process rights by failing to comply with the timeline provided for in section 5.17 of ST/SGB/2008/5.

- d. To award him damages for the delay.

Respondent's submissions

9. The Respondent submits that the panel is acting diligently to finalize its investigations and that, upon conclusion of the investigation, the panel will prepare a detailed report giving a full account of the facts it has ascertained in the process and attaching documentary evidence relevant to the prohibited conduct.

Considerations

10. In *Asariotis* 2013-UNAT-309, UNAT held that not every breach will give rise to an award of moral damages as a result of a breach of the procedural due process entitlements and that other entitlement to moral damages will necessarily depend on the nature of the evidence put before the Dispute Tribunal¹.

11. In his request for management evaluation of the issue, the Applicant stated that:

the prolonged delay in commencement of business of the Panel and the length of time taken by the Panel to determine and publish its report has caused moral and emotional anxiety hence a feeling that the process of handling of the complaint is biased and partial."

12. In his case to the Tribunal, the Applicant has neither repeated that submission nor has he provided any evidence about the effects on him of the delays which are described in this case. He remains in employment and there is no evidence of any actual material losses to him.

13. The Tribunal finds that whilst the delay in the investigation process in this case constitutes a breach of the requirements of promptness in ST/SGB/2005/8, the investigation of the Applicant's complaint of prohibited conduct is ongoing as opposed to making no progress at all. The Respondent's submission has provided the Applicant with a full explanation of the reasons for the delays. which, in the absence of any evidence to support a monetary award of compensation to the Applicant, the Tribunal finds is a sufficient remedy in all the circumstances.

¹ At para. 37.

JUDGMENT

14. No compensation is awarded.

(Signed)

Judge Coral Shaw

Dated this 29th day of September 2014

Entered in the Register on this 29th day of September 2014

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi