



Before: Judge Coral Shaw

Registry: Nairobi

Registrar: Abena Kwakye-Berko

BIRYA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Counsel for the Applicant:
Self-represented

Counsel for the Respondent:
Katya Melliush, 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) at the GS-4 level.
2. In an Application to the Tribunal dated 30 August 2014, he challenged the failure by the UNON Administration to investigate a report on an assassination attempt against him involving some UNON/DSS officials.
3. The Respondent filed a Reply on 1 October 2014 in which he alleged, *inter alia*, that the Application should be rejected because it is not receivable *ratione materiae*.
4. By Order No. 252 (NBI/2014), the Tribunal advised the parties that it would consider the question of receivability as a preliminary issue and invited the Applicant to make further submissions in response to the Respondent's Reply on this point. On 19 November 2014 he filed his submissions on receivability.

Facts

5. The Applicant has been employed at UNON as a Security Officer in UNON/DSS since August 2010.
6. On 18 February 2013, he filed a complaint of prohibited conduct pursuant to ST/SGB/2008/5 (Prohibition of discrimination, harassment, and abuse of authority) with the Director-General of UNON (DG) against the Assistant Chief of Security and another Security Officer. The complaint was copied, *inter alia*, to the Chief of Security, UNON/DSS.
7. On 7 September 2013, the Applicant wrote to the DG. He acknowledged the DG's advice to him to report any retaliation to the Ethics Office and said he would be filing this by 9 September. He also requested to be told who he should address his specific concerns to and reported that [DSS] "may be plotting to assassinate me". He alleged that the previous day he had been subject to an

assassination attempt outside the UNON complex by two men in police uniform armed with AK 47 rifles. He also alleged that two UNON Security Officers seemed to have been participating in this attack.

8. The DG responded to the Applicant's email on 9 September. She advised him, inter alia, to address his concerns about the alleged assassination attempt with the Ethics Office. The DG also stated:

Notwithstanding your concerns about the involvement of DSS staff in the alleged assassination attempt, I have to refer the matter to [the] Chief, SIOC who looks into all allegations of threats.

However in light of your repeatedly stated concerns about the integrity of DSS I have decided to initiate a fact-finding panel under ST/SGB/2008/5 as originally requested by you in your correspondence of 18 February 2013.

9. An organisational chart submitted in evidence by the Respondent shows that DSS is divided into two separate offices, the Security and Safety Service (SSS) and the office of the Chief Security Advisor (CSA). DSS is responsible for security and safety. Within the SSS the Special Investigation Unit investigates reported incidents. The office of the CSA is responsible for providing advice to the senior management team on safety and security issues. The Security Information Operations Centre (SIOC) is in this office and reports to the CSA.

10. In a submission to the Management Evaluation Unit (MEU) which was submitted to the Tribunal as evidence in the present case, the Chief of SIOC stated that the SIOC conducts threat, vulnerability and risk assessments for United Nations operations in Kenya. The outcome of the assessment process is advice to the CSA and the Designated Official for Security to enable safe and secure programme delivery. This advice is confidential and is not released or provided to staff members. The risk assessment process conducted by SIOC is completely separate from and unrelated to the investigation process provided for under ST/SGB/2008/5.

11. On 24 October 2013, in response to further enquiries from the Applicant, the Legal Advisor to the office of the Director-General told him that the DG had established a fact-finding panel to look into his complaints of harassment and that

he should raise the issues relating to his interactions with the Kenyan police with them. She advised that the DG could not comment on the involvement of “United Nations bosses” of which she knew nothing but that his concerns were taken seriously and she awaited the outcome of the fact-finding panel.

12. On 14 July 2014, the MEU received a request from the Applicant dated 13 July 2014 for management evaluation of the failure by the Chief of SIOC to conduct any credible investigations after the DG referred his report of the assassination attempt to him. The MEU acknowledged receipt of the request on 17 July 2014.

13. On 23 July 2014, the Chief of SIOC wrote to the Applicant asking to see him for an interview on his statement. The Applicant replied that he had sought a management evaluation and was waiting to hear from them. The Chief of SIOC replied asking him to confirm his availability for an interview on 29 July.

14. The Applicant replied that he had requested management evaluation on [the Chief’s] handling of the [assassination] report referred to him almost a year ago. He said “I have queried your failure to investigate the report within a reasonable time with the Management Evaluation and I am eagerly waiting to hear from them. An 11 month delay cannot in any way be considered to be “reasonable time”.

15. The Chief of SIOC’s report was concluded on 29 July 2014 and sent to the Chief of Security and the DG. His conclusion was that the incident reported by the Applicant did not change the broader threat and risk picture for the area of Nairobi in the immediate vicinity of UNON and the current risk assessment.

16. In the absence of any further response from MEU to his request by the deadline of 28 August 2014, the Applicant filed this Application on 30 August 2014.

17. The MEU issued its findings on the Applicant’s request for management evaluation on 11 September 2014. The Secretary-General upheld the contested decision.

Receivability

Respondent's submissions

18. The Respondent's submissions on receivability are summarized as follows:

a. In his request for management evaluation, the Applicant defined the contested decision as the failure by the Chief of SIOC to conduct a credible investigation after the DG referred the assassination attempt report to him. In his Application, however, the Applicant defines the contested decision as the failure by the UNON Administration to report on an assassination attempt involving UNON/DSS officials.

b. As the contested decision was not submitted for management evaluation, it is not receivable as article 8.1(c) of the Dispute Tribunal's Statute limits the scope of review by the Dispute Tribunal to the decision submitted for management review.

c. Any decision notified to the Applicant prior to 15 May 2014 is not reviewable before the Dispute Tribunal. Specifically, the Applicant cannot seek the review of the decisions conveyed to him on 9 September 2013 and 24 October 2013.

d. The Appeals Tribunal has long held that knowledge of the facts and not the legal consequences flowing from the facts determines the date from which the management evaluation must be sought. The Respondent cites *Chahrour* 2014-UNAT-406 in support of this submission.

e. Both the 9 September 2013 and 24 October 2013 communications were sufficient to trigger the limitations periods as they both advised the Applicant of the Organization's decision that he should submit his allegations directly to the Ethics Office and to the fact-finding panel for investigation. The time period for requesting review of these decisions expired and the Applicant cannot now challenge these decisions before the Tribunal.

f. The Applicant's claims are not receivable, as they do not concern an administrative decision within the meaning of article 2.1(a) of the Dispute Tribunal's Statute. An SIOC assessment does not have any direct legal consequence on the Applicant's terms of appointment. The advice from SIOC does not unilaterally or individually apply to the Applicant nor does the advice of the SIOC produce direct negative legal consequences affecting the Applicant's terms or conditions of employment. As a consequence, the advice from the SIOC is not reviewable by the Tribunal.

Applicant's submissions

19. The Applicant's submissions on receivability are summarized as follows:
- a. Paragraph 3.2 of ST/SGB/2008/5 places a statutory duty on managers and supervisors to ensure complaints of prohibited conduct are promptly addressed. The Chief of SIOC "effectively ignored his complaint for over ten months and this constituted misconduct within the meaning of staff rule 10.1.
 - b. The Applicant is entitled to challenge the Administration's failure to investigate the assassination attempt report within a reasonable period of time.
 - c. The date by which a staff member must seek review of an implied decision is determined by establishing the date on which the staff member knew or reasonably should have known of the implied decision.
 - d. Not making a decision is also a decision.
 - e. To determine if the failure to investigate a report is a reviewable administrative decision, the reviewing court must verify whether or not the delay affects the rights of the staff member.
 - f. The failure to investigate the assassination attempt is in non-compliance with the Applicant's terms of appointment which had the

potential to affect the Applicant's substantive rights to protection from intimidation and retaliation.

g. While the Respondent argues that the Applicant does not have a right to an investigation by SIOC, the administration purports to conduct an investigation but only after the request for management evaluation.

h. The Respondent's submission that an SIOC risk assessment does not have any direct legal consequence is misplaced as the referral of the assassination attempt report to SIOC was not a request for risk assessment to be conducted on the UNON compound.

i. The evidence given in the case of *Birya* UNDT/NBI/2014/010 indicates that the UNON Administration was part of the planning of the assassination attempt and that could explain why the Administration failed to investigate the report.

j. The Application is receivable both as to timeliness and substance.

Considerations on Receivability

20. In *Wasserstrom* 2014-UNAT-457, UNAT discussed the nature of an administrative decision that can be appealed to the Tribunal. It referred to article 2.1(a) of the UNDT Statute and stated that:

The key characteristic of an administrative decision subject to judicial review is that the decision must “produce [] direct legal consequences” affecting a staff member's terms or conditions of appointment. What constitutes an administrative decision will depend on the nature of the decision, the legal framework under which the decision was made, and the consequences of the decision.

Nature of the decision

21. The decision contested by the Applicant in his Application to the Tribunal is “[f]ailure by the UNON administration to investigate a report on an assassination attempt involving some DSS officers”. He alleged that the official who made the decision was the Chief of SIOC.

22. The letter of request to MEU and the subsequent correspondence with the Chief of SIOC makes it clear that the Applicant's complaint was against the Chief of SIOC's alleged failure to investigate the Applicant's report of an assassination attempt that had been referred to him in September 2013.

23. Although the wording of the decision in the Application differs from that identified by the Applicant in his request for management evaluation made on 13 July 2014, the Tribunal finds that the decisions identified in both are substantially the same.

24. It is well established that not taking a decision is an administrative decision that is capable of being reviewed by the Tribunal¹. The contested decision is the alleged failure of the Chief of SIOC to investigate the Applicant's report of an assassination attempt.

Legal Framework

25. No official issuances establishing the SIOC were submitted to the Tribunal, however, the uncontroverted evidence is that the SIOC is a component of DSS UNON that is constituted to provide advice and risk assessments. It is not an investigative body. The Special Investigation Unit carries out investigations within DSS.

26. The SIOC carried out a current risk analysis in relation to UNON as a result of the incident reported by the Applicant. The outcome of that analysis was in the form of advice to the Chief of Security and to the DG.

Consequences of the Decision

27. The DG's referral of the Applicant's allegation of an assassination attempt to SIOC was one part of her response to the allegation. She also advised the Applicant to address his concerns about that allegation to the Ethics Office and her legal adviser told him to report the matter to the fact-finding panel that had been established to look into other matters relating to the Applicant.

¹ *Tabari* 2010-UNAT-030 at para. 17.

28. The DG also informed the Applicant that she had referred his report for the Chief of SIOC to look into. She did not say that the SIOC would investigate the allegations.

29. Even if the risk analysis ultimately conducted by SIOC could be construed as an investigation, the outcome was not a decision affecting the Applicant or any other individual staff member. It was an assessment of the risks to UNON arising from the Applicant's report of an assassination attempt.

30. The Tribunal finds that the risk analysis of the SIOC did not result in a decision that had direct legal consequences for the Applicant. It also notes that the Applicant's safety and security concerns were being addressed by other appropriate entities of the United Nations such as the Ethics Office and the fact-finding panel thereby safeguarding his rights under his terms of appointment.

Conclusion

31. The alleged failure of the SIOC to investigate the Applicant's allegation of an attempted assassination attempt involving DSS officers was not an administrative decision that can be reviewed by the Tribunal in terms of article 2.1(a) of the UNDT Statute, as it did not have any direct legal consequences for the Applicant's terms or conditions of appointment. The Application is not receivable.

JUDGMENT

32. The Application is dismissed.

(Signed)

Judge Coral Shaw

Dated this 10th day of December 2014

Entered in the Register on this 10th day of December 2014

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi