



Before: Judge Goolam Meeran

Registry: New York

Registrar: Hafida Lahiouel

FAYE

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 is a Benefits Assistant at the GS-5 level at the United Nations Joint Staff Pension Fund (“UNJSPF”) and a staff representative. He contests the decision by the Chief Executive Officer (“CEO”) of the UNJSPF to submit budget estimates for the 2016-2017 biennium to the UNJSPF Board on 2 June 2015 without engaging in consultation with staff representatives. He contends that his rights were violated because he was not accorded the opportunity of being consulted in the process of formulating the budget estimates.

2. The Applicant requests that the Tribunal order the CEO of the UNJSPF to withdraw the 2016-17 budget estimates dated 2 June 2015. He also requests that the Tribunal order the Budget Committee of the UNJSPF Board not to consider the budget estimates until the required consultation has taken place. Finally, he requests appropriate compensation for the stress, pain, and suffering and the time and energy associated with the filing of the application.

3. The Respondent submits that the application is not receivable *ratione materiae* (because the contested decision does not fall within the Tribunal’s jurisdiction) and *ratione personae* (because the Applicant lacks legal standing).

4. This case was assigned to the undersigned Judge on 20 July 2015.

5. At a case management discussion (“CMD”) held on 22 July 2015, the Tribunal strongly advised the Applicant to consider the issues of law raised by the Respondent in his reply to the application and to read the case law cited therein. He was advised to then consider whether he was in a position to advance any persuasive arguments regarding the jurisdiction of the Tribunal to consider his claims.

6. The Applicant stated that he wished to continue with his claim. He was granted leave to file a final submission and he did so on 27 July 2015.

Considerations

7. On 10 February 2015, the Assistant Secretary-General, Office of Human Resources Management (“ASG/OHRM”) sent an email to heads of department titled “Reminder of Obligation to Consult with Staff Representatives in accordance with ST/SGB/172 and ST/SGB/274”. The email stated:

As your departments/offices prepare their respective Proposed Budgets for 2016-2017, I would like to remind you to consult with the staff representatives in your department where implementation of approved proposals have substantial implications on staff welfare and conditions of employment of your staff, as provided for in ST/SGB/172 and ST/SGB/274.

Please note that consultation with individual staff members potentially impacted would be held by a senior manager.

...

Did the Applicant request management evaluation of the contested decision?

8. Staff rule 11.2(a) requires a staff member to submit a request for management evaluation prior to filing an application challenging an administrative decision. Article 8.1(c) of the Dispute Tribunal’s Statute states that an application shall be receivable only if the Applicant has previously submitted the contested administrative decision for management evaluation, where required.

9. In a request for management evaluation dated 26 May 2015, the Applicant stated that he was contesting the failure of UNJSPF management to comply with the ASG/OHRM’s directive dated 10 February 2015 in regard to consultation with staff representatives. He stated that he came to know of the relevant decision on 12 May 2015.

10. However, in his application to the Tribunal dated 4 June 2015, the Applicant states that he is contesting the decision taken by the CEO of the UNJSPF on 2 June 2015 to submit budget estimates for the biennium 2016-2017 to the UNJSPF Board without consultation with staff representatives. The application states that he

requested management evaluation of the 2 June 2015 decision by the request dated 26 May 2015.

11. The Tribunal finds that the Applicant relies on a request for management evaluation that contested a different decision to the decision contested in his application. Indeed, the request for management evaluation that he relies upon was submitted prior to the date of the decision contested in his application.

12. On a strict interpretation of the Statute, this application can be dismissed, without more, because the decision contested in the request for management evaluation does not match the decision contested in the application. However, even if the Tribunal were to take a generous view and consider that the request for management evaluation and the application are both contesting a general failure to consult with staff representatives prior to submitting the 2016-2017 budget estimates, the application is not receivable for other reasons detailed below.

The Applicant does not have standing to challenge a decision affecting his rights as a staff representative

13. In his application, the Applicant clearly stated that he should have been consulted about the budget estimates *in his capacity as a staff representative*. The Tribunal takes cognizance of the fact that the General Assembly considered and rejected a proposal to grant staff associations standing to bring applications before the Dispute Tribunal to: (a) enforce the rights of staff associations; (b) appeal an administrative decision on behalf of a group of named staff members, or (c) support an application filed by one or more staff members (see Annex I of the Report of the Secretary-General on Administration of Justice, A/62/782, 3 April 2008). The proposed articles were not included in the Dispute Tribunal's Statute. The Tribunal concludes that the Applicant does not have standing to challenge a decision affecting his right to consultation as a staff representative. Although the Applicant has clearly spent much time and effort in preparing his closing submissions, following the warning and advice given at the CMD, his arguments are

in effect an attempt to enforce rights which the General Assembly specifically considered and decided not to confer upon staff associations and those acting in the capacity of staff association representatives.

The contested decision did not have direct legal consequences affecting the Applicant

14. The Appeals Tribunal has consistently held that the key characteristic of an administrative decision subject to judicial review is that the decision must produce direct legal consequences affecting the staff member's terms and conditions of appointment (*Andati-Amwayi* 2010-UNAT-058; *Lee* 2014-UNAT-481).

15. In the reply to the application the Respondent stated:

The proposed budget expenses for the Fund does not entail any major organizational changes to the Fund, nor does it have any substantial implications for the careers, welfare and working conditions of the staff of the Fund. On the contrary, the proposed budget expenses include a request to the General Assembly to approve funding for 29 additional posts and reclassification upwards of seven posts. There is no proposed restructuring, downsizing, relocation of posts or other proposal of this nature in the CEO's proposal.

Despite the Tribunal granting the Applicant two opportunities to respond to the submissions in the Respondent's reply, he has not provided a response of substance to this statement. He has not identified the direct legal consequences that the submission of budget estimates had on his welfare and conditions of employment.

16. In *Lee* 2014-UNAT-481, the Appeals Tribunal upheld the Dispute Tribunal's finding that a budgetary proposal made to the General Assembly to abolish a staff member's post was not an administrative decision subject to judicial review because it did not produce direct legal consequences on the staff member's terms and conditions of employment. The Appeals Tribunal held that both the submission of a budget proposal and the adoption of a budget proposal are merely acts preceding an administrative decision that would produce direct legal consequences.

17. The Tribunal finds that the submission of the 2016-2017 UNJSPF budget estimates did not have direct legal consequences on the Applicant's terms and conditions of appointment. Therefore, in accordance with the Appeals Tribunal's finding in *Lee*, the contested decision is not an administrative decision subject to judicial review.

18. Having found the application not receivable, it is not necessary to consider the merits of the application.

Costs

19. At the CMD held on 22 July 2015, the Applicant was advised by the Tribunal that if he wished to proceed with his claims in this case and Case No. UNDT/NY/2014/087, notwithstanding the advice received from the Tribunal, and he was unable to present an effective challenge to the legal contentions of the Respondent, he may face an order for costs under art. 10.6 of the Dispute Tribunal's Statute, which states:

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

20. In *Bi Bea* 2013-UNAT-370, the Appeals Tribunal stated that in order to award costs against a party, it is necessary for the Dispute Tribunal to be satisfied on the evidence that there was clearly and unmistakably a wrong or improper use of the proceedings of the court. The Appeals Tribunal noted that frivolous or vexatious conduct would satisfy this requirement.

21. In *Machanguana* 2014-UNAT-476, the Appeals Tribunal stated that it is incumbent on a Tribunal awarding costs to state the reasoning upon which its award of costs is based.

22. In *Terragnolo* 2015-UNAT-566, the Appeals Tribunal upheld an award of costs against the applicant for abuse of process noting that the filing of a frivolous application that was clearly not receivable (and submitting a huge volume of

irrelevant documents) by a staff member who has prior experience before the tribunals of the United Nations' internal justice system is a manifest abuse of the Dispute Tribunal's process.

23. In *Gehr* 2013-UNAT-328, the Appeals Tribunal ordered costs against the applicant, noting that it had previously indicated that he should be prepared to face an award of costs if he filed an appeal lacking in merit.

24. There is nothing in the Applicant's additional submissions dated 27 July 2015 to persuade the Tribunal that there is any merit in his application. The Tribunal finds that the Applicant has manifestly abused the proceedings by his persistence in advancing a legally unsustainable contention, despite guidance offered at the CMD on the applicable legal principles settled by the Appeals Tribunal. The Applicant may well be frustrated by what he perceived as a failure to consult the staff representatives on a matter over which they feel that they had a right to be consulted. However, a challenge before the Tribunal is wholly inappropriate in circumstances where it is clear that the Tribunal does not have power to grant the relief sought. The manner in which these proceedings have been conducted by the Applicant constitutes a manifest abuse of process. In assessing the amount of costs, the Tribunal has taken into account the circumstances of the case, including the fact that the Applicant is self-represented and acted in his capacity as a staff representative.

Judgment

25. The application is dismissed.

26. In exercise of power under art. 10.6 of its Statute, the Tribunal orders costs against the Applicant in the sum of USD500.

(Signed)

Judge Goolam Meeran

Dated this 2nd day of September 2015

Entered in the Register on this 2nd day of September 2015

(Signed)

Hafida Lahiouel, Registrar, New York