UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2015/048
Judgment No.: UNDT/2015/087
Date: 18 September 2015
Original: English

Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

KALASHNIK

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. On 8 August 2015, the Applicant, an Investigator at the P-3, Step 14 level in the Investigations Division, Office of Internal Oversight Services ("ID/OIOS"), filed an application contesting the outcome of two of his requests for management evaluation as endorsed by the Office of the Under-Secretary-General of the Department of Management ("USG/DM") in regard to the recruitment process for the P-4 Resident Investigator Roster position, and several other additional positions in OIOS. As relief, the Applicant requests an independent and impartial review of the conduct and outcome of the management evaluation as endorsed by management.

2. On 11 August 2015, the Registry served the application on the Respondent, advising that the Applicant had previously filed an incomplete application on 3 August 2015. In the reply filed on 11 September 2015, the Respondent contends that the application lacks merit and that the Applicant's challenge to the outcome of his two requests for management evaluation is not receivable *ratione materiae* since the Applicant does not contest an administrative decision under art. 2.1(a) of the Tribunal's Statute. Should the Tribunal identify an administrative decision that falls within its competence, the Respondent requests leave to file a meaningful defense thereafter.

Background

3. The Applicant states that, on 12 October 2014, he submitted a request for management evaluation concerning the conduct of the recruitment process for the P-4 Resident Investigator Roster. He complains that, *inter alia*, the Management Evaluation Unit ("MEU") misconducted and misconstrued the scope of his request, and also found his request not receivable on the basis that no final administrative decision was made. The Applicant alleges that the MEU

subsequently acknowledged the "contradiction" as the recruitment process had indeed been completed, and invited him to resubmit his request.

4. The Applicant thereafter resubmitted an updated request to the MEU on 9 January 2015, including requests for management evaluation of several other additional positions and post specific recruitments that had been completed by then. The Applicant complains that the further response he received misrepresented the scope and nature of his requests, dismissed and twisted information and facts provided by him, and generally simply accepted the responses given by senior management of the OIOS. The Applicant alleges that on 9 March 2015, in a meeting, MEU representatives admitted that additional recruitment processes he challenged had not been looked into.

5. On 23 April 2015, the Applicant submitted a further request "for management evaluation of the decision not to conduct a regular management evaluation of [his] January-February 2015 requests…" The Applicant lists further correspondence until August 2015 and alleges that the MEU also breached confidentiality, continued to misrepresent the scope and nature of his requests, and refused to receive any further requests on the grounds that they had been covered in his previous submissions. As relief, the Applicant requests "an efficient effective and impartial review" of his requests for management evaluation by parties who are not subject to conflict of interest and will not simply endorse the outcome of the MEU.

Consideration

6. Whilst, in fairness to all parties, it is the practice of the Dispute Tribunal to deal with cases in chronological order of filing, the General Assembly has requested in its resolution 66/237, adopted on 24 December 2011, that the Dispute Tribunal and the Appeals Tribunal review their procedures in regard to the dismissal of "manifestly inadmissible cases". It is a matter of record that

the Dispute Tribunal, even prior to the aforesaid resolution 66/237, entertained and continues to deal with matters of admissibility or receivability on a priority basis in appropriate cases, and also renders summary judgments in appropriate cases under art. 9 of the Tribunal's Rules of Procedure.

7. Article 9 of the Tribunal's Rules of Procedure provides that a party may move for summary judgment when there is no dispute as to the material facts of the case and a party is entitled to judgment as a matter of law. The Dispute Tribunal may itself determine, on its own initiative, that summary judgment is appropriate.

8. The appropriateness of an application for summary judgment was discussed in *Cooke* UNDT/2011/216, wherein the Tribunal indicated that if the receivability of a case is being challenged, the Tribunal cannot determine the facts of the application on the merits or even consider whether such facts are common cause or contested, highlighting that summary judgment is a judgment on the merits and a party cannot ask for it if the full facts have not been pleaded. The Tribunal found the appropriate procedure would be to deal with the matter as a receivability issue. (*Cooke* UNDT/2011/216 was subsequently vacated in *Cooke* 2012-UNAT-275, in which the Appeals Tribunal found that the application was not receivable, but made no pronouncements regarding the Dispute Tribunal's observations regarding the nature of a summary judgment.)

9. A cursory overview of common law jurisdictions is indicative of the position that summary judgment is normally granted on the filing of affidavits on substantive claims, and is not a procedure normally used for disposal of matters on receivability or admissibility. However, the contextualization of an application for summary judgment, whilst determined by individual jurisdictional experience and familiarity, will also no doubt entail some general principles commonly adopted in multiple jurisdictions with a view to expediting proceedings where facts are not in dispute and the law is clear. Whatever nomenclature is

given to the process is, to my mind, not material, as the Tribunal has dealt with matters summarily by striking out or dismissal on the grounds of vexatiousness, frivolity, abuse of process, manifest inadmissibility, failure to disclose a cause of action, and so on.

10. In the instant case, the Tribunal cannot say that there is no dispute as to the material facts as portrayed by the Applicant since the Respondent denies them, has not pleaded to the facts on the merits, and seeks leave to do so subsequently in the event the submission on receivability fails.

11. Therefore, even though the matter may not be suitable for summary judgement under art. 9 of the Rules of Procedure, the matter may still be dealt with on an expedited basis as the application appears to be clearly manifestly inadmissible.

12. It is settled law that the contested decision which may be reviewed by the Dispute Tribunal is not the decision of the MEU, but the administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment of the staff member. In *Staedtler* UNDT/2014/046, the Tribunal, per Shaw J, stated at para. 25 onwards:

> 25. MEU was established by General Assembly resolution 63/228. In article 50 the GA emphasised the need to have in place a process of management evaluation that is efficient, effective and impartial. In article 51 the General Assembly reaffirmed the importance of the general principle of exhausting administrative remedies before formal proceeding are instituted.
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> 26. Staff rule 11.2 provides that
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> > (a) A staff member wishing to formally contest an administrative decision alleging non-compliance with his or 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 to the Secretary-General in

> writing a request for a management evaluation of the administrative decision.
>
> 27. These resolutions and rules set up a system of management evaluation as a prerequisite step which must be exhausted in a timely manner before an application (apart from disciplinary cases) may be brought to the Tribunal.
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> 28. Although MEU sits outside the formal United Nations internal justice system it does intersect with it. This is demonstrated in article 2.2 of the Statute which gives competence to the Tribunal to suspend an administrative decision during the pendency of a management evaluation.
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> 29. When an application is filed in the Tribunal, the contested decision which may be reviewed is not the decision of t [sic] MEU but the administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment. The outcome of a review of the administrative decision by MEU is not of itself an administrative decision as defined in article 2 and the Tribunal is not competent to hear and pass judgment on it.
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> 30. The remedy for an applicant who is dissatisfied with the outcome of an MEU review of an administrative decision is to file an application with the Tribunal. The Tribunal hears the appeal against the administrative decision de novo and without regard to the outcome of the MEU review. This gives an applicant a second opportunity to present his or her case afresh to the Tribunal.

13. The recommendations of the MEU, and the Secretary-General's responses to the Applicant's request for management evaluation, as communicated by the letters dated 23 February and 5 May 2015, not being subject to review by the Tribunal, this application is not receivable, and is manifestly inadmissible.

14. The Tribunal also notes that the administrative decisions challenged by the Applicant concern precisely the same job openings/administrative decisions challenged under case number UNDT/NY/2015/031 filed by the Applicant on 26 May 2015.

15. An applicant may not file multiple applications concerning the same administrative decision as this offends against the principle of *lis pendens* which

disavows simultaneous parallel proceedings between the same parties, concerning the same subject matter and founded on the same cause of action.

Conclusion

16. In all the above circumstances, the Tribunal finds that the application is manifestly inadmissible.

17. Accordingly, the application is dismissed.

(Signed)

Judge Ebrahim-Carstens

Dated this 18th day of September 2015

Entered in the Register on this 18th day of September 2015

(Signed)

Hafida Lahiouel, Registrar, New York