



UNITED NATIONS DISPUTE TRIBUNAL

Case Nos.: UNDT/NBI/2015/174
UNDT/NBI/2015/175
UNDT/NBI/2015/176
Judgment No.: UNDT/2017/034
Date: 10 May 2017
Original: English

Before: Judge Alexander W. Hunter, Jr.

Registry: Nairobi

Registrar: Abena Kwakye-Berko

NGERO
WANI
SEBUKAKARI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Counsel for the Applicant:
Daniel Trup, OSLA

Counsel for the Respondent:
Steven Dietrich, ALS/OHRM
Alister Cumming, ALS/OHRM

Introduction

1. At the time of the events giving rise to these applications, the Applicants were staff members of the United Nations Organization Stabilization Mission in the Democratic Republic of Congo (MONUSCO) who had been assigned to the United Nations Regional Service Centre in Entebbe (RSCE). On 30 November 2015, they filed separate applications before the United Nations Dispute Tribunal (UNDT) challenging the decisions by the Administration not to consider their requests to grant them compensation for breaches of United Nations obligations concerning their “detention and charging” by local law enforcement “without undertaking a full and proper investigation and obtaining a prior waiver of immunity.”

2. The Respondent filed replies to the applications on 4 January 2016 contending that the applications were not receivable because: (i) the Applicants failed to request management evaluations of the impugned administrative decisions, and (ii) there have been no final administrative decisions within the meaning of the UNDT Statute.

3. On 23 January 2017, the Tribunal issued Order Nos. 014 (NBI/2017), 015 (NBI/2017) and 016 (NBI/2017) inviting the parties to submit their views in relation to the consolidation of the three cases. The parties were also informed that the Tribunal had decided, in accordance with art. 16.1 of the Tribunal’s Rules of Procedure, that an oral hearing was not required in determining the preliminary issue of receivability in these cases and that it would rely on the parties’ pleadings and written submissions.

4. The Applicants and Respondent replied to the Orders on 26 and 27 January 2017, respectively, and agreed with the Tribunal’s view that it would be more efficient to address the applications together.

5. On 10 February 2017, the Tribunal consolidated the three applications.

Facts

6. On 14 April 2012, the Applicants were arrested in connection with an allegation of attempted theft of a generator from the RSCE. Unbeknownst to the Applicants, by implication, their immunities from prosecution were waived by the Administration at that time.

7. Two of the Applicants were detained for five days and one was detained for three days before being charged with the attempted theft of the generator. They were then released on bail.

8. On 16 May 2012, MONUSCO issued a *Note Verbale* to the Ministry of Foreign Affairs and Cooperation of the Republic of Uganda. The *Note Verbale* informed Ugandan authorities, officially and for the first time, “that the Secretary-General has waived the immunity from legal process that is enjoyed by [the Applicants] to the extent necessary to permit them to be investigated and charged by Ugandan police and to be prosecuted, tried and, if found guilty, sentenced before and by the Ugandan national courts with respect to their possible involvement in the suspected attempted theft of an electrical generator from the MONUSCO base in Entebbe.” The Applicants, however, were never officially and directly informed of this waiver by the Administration.

9. The Special Investigations Unit at the United Nations Entebbe Support Base/RSCE (SIU/UNESB) finished its internal investigation on 20 December 2012 and filed its final report on 24 December 2012.

10. On 3 July 2015, the Applicants were acquitted of all charges by the Ugandan criminal court.

11. On 5 October 2015, counsel for the Applicants wrote to the Chief, RSCE, requesting an *ex gratia* payment of compensation for the breaches of procedural due process relating to the arrest and waiver of immunity.

12. Between 19 and 26 October 2015, the Applicants filed management evaluation requests challenging the decisions of the Administration not to consider their applications for compensation.

13. On 2 November 2015, the Management Evaluation Unit (MEU) responded to the Applicants' requests determining that their cases were not receivable. Specifically, MEU noted that they had contacted MONUSCO and that they had been informed that the Applicants' requests was under review. As a result, MEU therefore determined that no administrative decision had been made.

The Respondent's submissions on receivability

The Application is not receivable ratione temporis

14. The Applicants' requests for *ex gratia* payments of compensation are, in substance and in form, requests for management evaluation. The Applicants are requesting that the Organization conduct an administrative review of waiver-related decisions they believe were incorrect. The fact that they misdirected their requests to the Chief, RSCE, who does not have the authority to conduct such a review, or to disburse funds on an *ex gratia* basis on behalf of the Secretary-General, does not change the substance of the request and does not reset the expired timeline for requesting administrative review.

15. As a mandatory first step before challenging an administrative decision before the Dispute Tribunal, an applicant must request management evaluation of the contested decision, in accordance with staff rule 11.2. Such a request must be lodged within 60 days of the staff member receiving notification of the contested decision. The Dispute Tribunal does not have the power to waive or suspend the deadline for requesting management evaluation of an administrative decision.

16. In the case of *Zewdu* UNDT/2011/043, the Dispute Tribunal held that staff members have a duty to pursue their causes of action promptly. A staff member must pursue his or her request for management evaluation at the earliest time that legal action could have been brought. Staff members are deemed to be aware of the provisions of the Staff Rules.

17. The Applicants in these three cases are seeking to revive claims that have expired by making new requests. The Applicants were arrested on 14 April 2012. If they wished to challenge any administrative decisions connected to the circumstances of their arrest on the grounds that the procedures in ST/AI/299 (Reporting of Arrest or Detention of Staff Members, Other Agents of the United Nations and Members of Their Families) had not been complied with, then the time for them to raise such a challenge started on that date, regardless of whether or not the Applicants understood that they could have requested management evaluation at that time. They should have submitted requests for management evaluation within 60 days thereafter, that is, by 13 June 2012.

18. Although the Applicants have framed their applications as challenges to the failure of the Administration to consider their requests for compensation, they are in fact challenging the underlying procedure followed during their arrests and the waiver of their immunity in May 2012. Those challenges are also out of time for filing.

19. The Applicants may not now attempt to create new causes of action by requesting compensation as a discretionary measure, then challenging the failure to reply to their requests within an arbitrary deadline.

The Applications are not receivable ratione materiae

20. Although a failure to reach a decision in a reasonable time can in certain circumstances amount to an administrative decision, there are no such failures giving rise to administrative decisions in these cases.

21. There is no freestanding right to have a decision taken in a reasonable time. Failure to reach a decision, in and of itself, does not amount to an administrative decision. In order for a failure to make a decision to amount to an administrative decision, there must be direct legal consequences for the Applicant. In the instant cases, any failures to make decisions had no direct legal consequences for the Applicants as the Applicants have no right to the remedy they are requesting, namely *ex gratia* payments.

22. In the instant cases, the Applicants have requested *ex gratia* payments of compensation for alleged breaches of the procedures regarding the arrest of staff members and the waiver of their immunity. They have no right to such compensation. In effect, the Applicants are seeking payments by way of gift or favour, rather than payments of an entitlement that the Organization was obliged to pay under the terms of their appointment. By its very nature, the Administration's response to a request for an *ex gratia* payments does not constitute an administrative decision under art. 2.1(a) of the UNDT Statute, as it does not relate to an entitlement and carries no direct legal consequences.

23. The Applicants are unable to show that any failure to reach decisions had direct legal consequences for them. In the absence of this, any failure to take a decision is not an administrative decision that may be challenged.

24. In any event, there has been no failure to make a decision. As was made clear to the Applicants in the communications from MONUSCO on 30 October 2015, further investigations are being carried out and the Applicants' requests for compensation are being considered. A short delay regarding a request which is still under consideration cannot amount to a challengeable decision. Accordingly, there is no administrative decision capable of judicial review, and the applications should be dismissed as not receivable.

The Applicants' submissions on receivability

25. Administrative decisions, which are subject to review, are not always presented as affirmative decisions. They are sometimes in the form of a failure to act, which may be characterized as an implied administrative decision.

26. In these cases, the Applicants sought management evaluations of the refusal by the Administration to consider their requests for compensation, which was made on 5 October 2015. The failure of the Administration to formally reply (either granting or refusing the request) by the time the Applicants filed their management evaluation requests on 19 and 26 October 2015 constitutes implicit refusals.

27. Since the Applicants have not received formal written notifications, they were not in a position to challenge the explicit refusals to grant the requests but only the general failure of the Administration to consider their applications positively.

28. Following receipt of these requests, these matters were forwarded to MONUSCO which is the appropriate office for such a consideration. On 30 October 2015, the Officer-in-Charge of the Legal Affairs Office of MONUSCO wrote to the Applicants' counsel, stating:

I have seen the request for compensation and am seeking to gather all of the relevant information for review. As such we will revert as soon (as) possible, bearing in mind we need to consult with (the Office of Legal Affairs).

29. However, this consideration only seems to have taken place after the filing of management evaluation requests.

30. The MEU conclusions that the cases were not receivable due to the lack of any formal decision having been reached cannot be sustained. It is unjustified that the Administration ignores a reasonable period of time and simply withholds the issuance of any decisions.

31. As held in *Terragnolo* UNDT/2014/107, 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.

32. In these cases, the Applicants submitted their requests on 5 October 2015. Subsequently, on 26 October 2015, the Applicants filed management evaluation requests on the basis of not having received formal decisions from the Administration. The Applicants submit that a delay of three weeks constitutes a reasonable period of time for a decision to have been made in the circumstances of the complaint.

33. The Applicants cannot be held hostage to the Administration's belated consideration of their original applications. A time limit was reasonably set by the

Applicants and the Administration's refusal to issue formal decisions within this time frame, or indeed on or before 26 October 2015, constitute implied decisions of refusal.

34. If the Applicants are required to await decisions, this would mean that they would be effectively barred from challenging decisions after a reasonable period of time has expired since the Administration has yet to render a final determination. In the meantime, the Applicants, pursuant to the decisions of the MEU dated 2 November 2015, are barred from challenging the implicit refusals of the Administration on the basis that final determinations have not been rendered. This would be untenable.

35. As a result, the Administration's failure in taking decisions on the Applicants' requests by 26 October 2015 should be regarded as implied refusals and, as such, the applications should be found receivable.

36. Furthermore, as of the date of the filing these applications, over seven weeks from the initial requests being made by the Applicants, the Administration has not rendered any formal decision or issued any form of official communication.

Considerations on receivability

37. Articles 8.1(c) and (d) of the UNDT Statute provide that an application shall be receivable if an applicant has previously submitted the requested administrative decision for management evaluation where required and the application is filed within 90 calendar days of the expiry of the relevant response period for the management evaluation if no response to the request was provided. The response period shall be 30 calendar days after the submission of the decision to management evaluation for disputes arising at Headquarters and 45 calendar days for other offices. Pursuant to art. 8.1(i)(a) of the UNDT Statute, in cases where a management evaluation of the contested decision is required, an application must be filed within 90 calendar days of the applicant's receipt of the response by management to his or her submission.

38. Pursuant to staff rule 11.2(c), a request for a management evaluation shall not be receivable by the Secretary-General unless it is sent within 60 calendar days from the date on which the staff member received notification of the administrative decision to be contested.

When did the causes of action arise?

39. The impugned decisions are alleged failures by the MONUSCO administration to consider the Applicants' requests to grant them compensation for breaches of United Nations obligations concerning their detention and charging by local law enforcement.

40. In order to decide on the receivability of the applications, the Tribunal must first determine at what time the Applicants' causes of action arose or, in other words, at what time the Applicants became aware that their rights to compensation for alleged breaches of the procedures by the MONUSCO administration arose under A/63/331 (Information-sharing practices between the United Nations and national law enforcement authorities, as well as referral of possible criminal cases related to United Nations staff, United Nations officials and experts on mission) and ST/AI/299 (Reporting of the arrest or detention of staff members, other agents of the United Nations and members of their families).

41. The uncontested evidence before the Tribunal is that on Saturday, 14 April 2012, two of the Applicants were called into the RSCE with respect to the attempted theft of a generator. The third Applicant had been tasked to take the heavy goods vehicle, in which the stolen generator was found, from the RSCE base to the United Nations Communications Tower Katabi. Once on the base, the Ugandan police arrested and questioned the Applicants at the local police station. Two of the Applicants were detained for five days while one was detained for three days by the police before being charged with the attempted theft of the generator and were, thereafter, released on bail. On 16 May 2012, MONUSCO issued a *Note Verbale* to the Ministry of Foreign Affairs and Cooperation of the Republic of Uganda. The *Note Verbale* informed Ugandan authorities that the Secretary-General had waived immunity for the Applicants. Between 16 May

2012 and 3 July 2015, the Applicants went through the judicial process in Uganda and were subsequently acquitted.

42. From the foregoing, it is not unreasonable to infer that on 3 July 2015, having gone through the rigors of a criminal judicial proceeding and having been acquitted of all charges, the Applicants became aware that there may have been breaches of the applicable rules governing their arrest and detention as United Nations staff members and the waiver of their immunities.

43. All relevant non-work product paperwork, including the *Note Verbale*, should have been turned over to the Applicants' counsel voluntarily or upon request by this time. Even assuming, *arguendo*, that the Applicants were aware of the content of the *Note Verbale* at some earlier stage of the criminal proceeding, it would not have resulted in their release from custody sooner than the three or five days that they were detained before being charged and released. In other words, there was no need for the United Nations to take custody and control of the Applicants since they were already at liberty early in the proceedings. The acquittals might lend credence to the merits of their claims herein for damages and attorneys' fees. But if the Applicants were convicted, they might think twice about filing suit against the Secretary-General.

44. The Tribunal finds and holds that the Applicants' causes of action in relation to the remedies for the alleged breaches of the procedures under A/63/331 and ST/AI/299 arose on 3 July 2015. Accordingly, pursuant to staff rule 11.2(c) the Applicants were, therefore, required to seek management evaluation of the alleged breaches of the applicable rules governing their arrest and detention as United Nations staff members and the waiver of their immunities within 60 days of 3 July 2015, that is, by 1 September but they did not do so. The Tribunal does not have the power to waive the deadlines for management evaluation.¹ Instead, on 5 October 2015, the Applicants wrote to the Chief of RSCE to request the exercise of discretion to award compensation for alleged breaches of the United Nations obligations towards staff members and, having received no response by

¹ Article 8.3 of the UNDT Statute.

16 October 2015, they filed requests for management evaluation on 19 and 26 October 2015.

45. Furthermore, the Tribunal holds that on 5 October 2015, the Applicants' counsel tried to create a new cause of action by requesting that the Respondent exercise his discretion to pay damages for the alleged violations of the Applicants' rights which occurred in 2012. In *Comerford-Verzuu* 2012-UNAT-203, the United Nations Appeals Tribunal (UNAT) stated,

We do not think that commencing correspondence with the Administration on whether the contentions were correct or not and ultimately giving a 14-day time limit to reply failing which Ms. Comerford-Verzuu would presume the commencement of the time limit to seek administrative review was the right way forward. The OIOS' reply of 2 August 2005 was the administrative decision of which the Appellant was seeking a review.

UNAT concluded that the subsequent correspondence was unwarranted and did not extend the time limit for seeking administrative review of the first administrative order. As no administrative review was sought within the prescribed time limit, the Applicant's challenge was correctly deemed to not be receivable *ratione temporis*. The same applies in this case.

Judgment

46. These applications are rejected as the Applicants failed to request management evaluation in a timely manner.

(Signed)

Judge Alexander W. Hunter, Jr.

Dated this 10th day of May 2017

Entered in the Register on this 10th day of May 2017

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi