



Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Abena Kwakye-Berko

HAYDAR

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Counsel for the Applicant:

Edwin Nhliziyo

Counsel for the Respondent:

Nicole Wynn, ALS/OHRM

Paulos Weldesellasie, ALS/OHRM

Introduction

1. The Applicant is serving as a Supply Officer at the P-3 level with the United Nations Multidimensional Integrated Stabilization Mission in the Central African Republic (MINUSCA).

Procedural history

2. The Applicant filed an application with the United Nations Dispute Tribunal (UNDT/the Tribunal) in Nairobi on 23 February 2017. The Applicant's counsel initially filed the application erroneously under his name in the e-Filing portal (CCMS) thus the UNDT Registry in Nairobi (the Registry) was unable to serve the application until CCMS Support corrected the error on 1 March 2017. The application was served on the Respondent on 2 March 2017.

3. The Respondent informed the Registry on 3 March 2017 that three annexes indicated in Section X of the application as supporting documents had not been filed with the application.

4. By emails dated 7 and 10 March 2017, the Registry wrote to the Applicant requesting that she complete her application by uploading the missing annexes into CCMS. The Applicant neither responded to the emails nor complied with the request to complete her application.

5. The Tribunal, by its Order No. 068 (NBI/2017) dated 21 March 2017, ordered the Applicant to file all of the missing annexes by 28 March 2017 and informed her that a failure to submit proof of a request for management evaluation by 28 March 2017 would result in her application being dismissed for non-compliance. The Tribunal temporarily suspended the Respondent's deadline for filing a reply.

6. The Applicant complied with Order No. 068 on 28 March 2017.

7. The amended application was served on the Respondent on 7 April 2017 with a deadline of 10 May 2017 for a reply.

8. On 3 May 2017, the Respondent filed a motion to have receivability determined as a preliminary matter. He requested leave and filed a reply on receivability. He also requested a suspension of the 10 May deadline for the filing of his reply on the merits of the application pending the Tribunal's determination on his motion.

9. By email dated 10 May 2017, the Registry informed the parties of the Tribunal's decision to suspend the deadline for the Respondent's reply on the merits of the application until further notice.

10. By Order No. 100 (NBI/2017), the Tribunal instructed the parties to attend a case management discussion on 25 July 2017.

Background

11. Applicant is a P-3 Supply Officer with MINUSCA. She was assigned to the Integrated Warehouse Section (IWH) when she joined MINUSCA.

12. On 21 April 2016, Mr. Dirk Lewyllie, Chief of MINUSCA's Property Management Section, invited the Applicant and other MINUSCA staff members to attend a brainstorming session on streamlining of the Integrated Warehouse Section's (IWH) operations at his home on Saturday, 23 April.

13. The Applicant responded to Mr. Lewyllie the same day requesting that the brainstorming session be conducted on MINUSCA premises since the meeting was work-related.

14. On 22 April 2016, the Applicant emailed the MINUSCA Chief Human Resources Officer (CHRO) asserting that Mr. Lewyllie had insulted her by telling her to "make [herself] useless somewhere". She further asserted that she did not report to Mr. Lewyllie and saw no reason as to "why he has to bother me continuously". The Applicant asked the CHRO for protection "from this kind of professional harassment". The Applicant copied Mr. Lewyllie, Mr. Gerard Buckley, Chief of MINUSCA's Supply Chain Management, Mr. Milan Trojanovic, MINUSCA's Director of Mission Support (DMS), and another staff member on this email.

15. On the same day, Mr. Buckley responded to the Applicant's email. He clarified that: (i) as a P-5 officer, Mr. Lewyllie was nominally his deputy who had full authority to act on his behalf by tasking and monitoring IWH staff; (ii) Mr. Lewyllie had changed the venue of the brainstorming session to the MINUSCA premises upon receipt of the Applicant's request; (iii) the Applicant did have a reporting line to Mr. Lewyllie; (iv) he had had occasion to caution the Applicant about her attitude but it had had no effect on her; and (v) he had received complaints regarding the Applicant's attitude and general behavior from her supervisor and several IWH staff. In light of the foregoing, Mr. Lewyllie requested that the DMS reassign the Applicant to the Supply Section or any other suitable function within the Mission "whilst her allegations of Professional Harassment are investigated".

16. On 23 April 2016, Mr. Lewyllie informed Mr. Buckley that he had had to cancel the brainstorming session that afternoon because the Applicant forbade the IWH Operations Manager from preparing the meeting room. According to Mr. Lewyllie, he found the other staff members standing outside the meeting room waiting for it to be prepared and when he asked the Applicant for an explanation, she completely ignored him.

17. Mr. Buckley forwarded Mr. Lewyllie's email to the DMS, with a copy to the Applicant and others. He told the DMS that he found the Applicant to be obstructive and non-cooperative and reiterated his request to have her immediately transferred out of IWH.

18. The Applicant emailed the DMS on 26 April 2016, with a copy to Mr. Buckley, the CHRO and others, expressing shock at Mr. Buckley's request to have her transferred "on the basis of unverified allegations". She asserted that she was a victim of "spurious allegations" against her by others but that these allegations had never been investigated. She pointed out that before any adverse action was taken against her, the allegations against her had to be verified. Lastly, she informed the DMS that her e-PAS was under rebuttal and that Mr. Lewyllie who had been party to the adverse ePAS was only trying to mount a new attack on

her credibility. She ended her email by saying she was simply asking for “due process, mutual respect and an end to the harassment”.

19. On the same day, Mr. Buckley responded to the Applicant’s email. He explained, *inter alia*, that the Applicant was the one alleging professional harassment and expressed his support for an investigation into her allegations. He explained that while several IWH staff members had complained about the Applicant, only two had submitted written complaints but the IWH supervisor had failed to act on them. He indicated that he was attaching copies of the complaints to his email.

20. The DMS, by a memorandum dated 29 April 2016, informed the Applicant of his decision to temporarily assign her with immediate effect from IWH to the Supply Unit “pending resolution of [her complaint of professional harassment] and to ensure that all staff work in a harmonious environment that is conducive to high performance”.

21. The Applicant requested management evaluation of the decision to reassign her from IWH to the Supply Unit on 1 May 2016.

22. On 19 May 2016, the Under-Secretary-General for Management (USG/DM) responded to the Applicant’s request for management evaluation. He was of the view that the contested decision was a reasonable exercise of managerial discretion and decided to uphold it.

23. On 24 August 2016, the Rebuttal Panel (the Panel) that had been constituted at the Applicant’s request to assess her 2014/2015 performance appraisal finalized its report. The Panel concluded that the e-PAS was not conducted in conformity with United Nations rules and unanimously recommended that her overall rating be changed to “satisfactory”. According to the Applicant, she received the report on 26 September 2016.

24. On 22 October 2016, the Applicant submitted a request for management evaluation seeking the removal of her SRO’s and FRO’s comments and rating in her 2015/2016 e-PAS.

25. On 23 November 2016, the Applicant submitted a request for management evaluation against the Rebuttal Panel report of 24 August 2016 and the procedures followed by the Rebuttal Panel.

26. On 25 and 29 November 2016, MEU responded to the Applicant's requests of 22 October and 23 November. MEU informed her that her requests were not receivable because there were no reviewable administrative decisions.

Issues

27. The only issue for determination here is whether the application is receivable pursuant to articles 2.1(a) and 8.1 of the UNDT Statute.

Considerations

28. The Respondent contends that the application is not receivable *rationae materiae* because the Applicant failed to identify any administrative decisions within the meaning of art. 2.1(a) of the UNDT Statute. The Respondent submits that the "vague and disorganized fashion" in which the application is presented deprives him of notice of the administrative decisions being challenged and undermines his ability to reply meaningfully.

29. For its part, the unwieldy nature of this application leaves the Tribunal with no choice but to go back and review article 2.1(a) of the UNDT Statute. This article provides that the Tribunal is competent to hear and pass judgment on applications appealing an *administrative decision* alleged to be in non-compliance with the terms of appointment or the contract of employment of the concerned applicant. Art. 2.1(a) establishes that the terms "contract" and "terms of appointment" include all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged non-compliance.

30. The *locus classicus* with regard to what constitutes an administrative decision is set out by the former United Nations Administrative Tribunal in Judgment No. 1157, *Andronov* (2002), in which the learned Tribunal defined it thus:

A unilateral decision taken by the administration in a precise individual case (individual administrative act), which produces direct legal consequences to the legal order. ... Administrative decisions are therefore characterized by the fact that they are taken by the Administration, they are unilateral and of individual application and they carry direct legal consequences.

This definition has been endorsed repeatedly by the United Nations Appeals Tribunal (the Appeals Tribunal) in its jurisprudence.¹

31. In stating her case, the Applicant describes the contested decisions as follows in her application:

- a. “A wall of silence” regarding “misrepresentations” made to MEU and subsequently transmitted to UNDT;
- b. The delay in releasing to her the results of an investigation into the circumstances leading to her reassignment in 2016;
- c. The absence of any meaningful investigation/fact finding into the hostile work environment she is forced to work in and corrective measures to address the issue;
- d. The Secretary-General’s failure to take action against MINUSCA managers for engaging in prohibited conduct and to protect her rights as a staff member;
- e. The Secretary-General’s persistent failure to take action against managers who have engaged in prohibited conduct has resulted in her losing her right to be treated with dignity and to work in an environment that is free from discrimination, harassment and abuse under paragraph 2.1 of ST/SGB/2008/5.
- f. The Secretary-General’s dereliction of his duty to act has allowed the MINUSCA managers to act with impunity and to use underhanded means to accomplish their goals. MINUSCA managers have abused their office

¹ *Tabara* 2010-UNAT-030; *Tintukasiri* 2015-UNAT-526; *Kazazi* 2015-UNAT-557

by soliciting damaging information against their perceived enemies from subordinates.

32. The Applicant states at page 4 of her application that the decisions she is challenging were all made on 25 and 29 November 2016. Further, she indicates that the persons who made these decisions were Mr. Jimmy Bala, Chief of the IWH, Mr. Lewyllie and Mr. Buckley and that she was notified of the decisions by these same people on 25 and 29 November 2016. The Tribunal has carefully perused the documents submitted by the Applicant with her application and has not been able to find any decisions dated 25 and 29 November 2016 that were authored/made by Messrs. Bala, Lewyllie and Buckley.

33. The Tribunal did, however, locate MEU responses to the Applicant dated 25 and 29 November 2016 in relation to her 22 October and 23 November 2016 requests for management evaluation, which she acknowledged receiving on 25 and 29 November at page 4 of her application. Thus, the Tribunal can only conclude that the Applicant is in actuality contesting the MEU responses of those dates.

34. Is this Tribunal competent to entertain applications which challenge the outcome or the views of management evaluation? In *Kalashnik* UNDT/2015/087, the Tribunal held that:

[...] 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.

35. In upholding the UNDT judgment, the Appeals Tribunal in its judgment *Kalashnik* 2016-UNAT-661 held that:

[...] Accordingly, it is fair to say that the General Assembly when enacting the provisions of the UNDT Statute did not consider the Administration's response to a request for management evaluation to be a decision that "produced direct legal consequences" affecting a staff member's terms and conditions of appointment. To the contrary, as discussed above, "the nature of the decision, the legal framework under which the decision was made, and the consequences of the decision" all support the conclusion that the

Administration's response to a request for management evaluation is not a reviewable decision. The response is an opportunity for the Administration to resolve a staff member's grievance without litigation – not a fresh decision.

36. In light of the fact that the Administration's response to a request for management evaluation is not a reviewable administrative decision, the Tribunal could proceed to dismiss the application at this juncture but it will not do so. To ensure that each of the contentions raised by the Applicant in her application as administrative decisions is properly interred, the Tribunal will examine them.

a. The wall of silence

37. The Applicant submits that during the rebuttal process, there were revelations that convinced her that there was a "conspiracy to underrate her performance" and that her concerns were deepened when months later she was reassigned to the Supply Section.

38. In *Reid* 2014-UNAT-419², the Appeals Tribunal concluded that the Dispute Tribunal correctly found that the applicant failed to identify a reviewable administrative decision in that he failed to identify a specific decision which had a direct and adverse impact on his contractual rights.

39. The Tribunal finds that the Applicant's submission that "it is this wall of silence she is going against" is nothing but a general averment comprised of an unsubstantiated allegation of a conspiracy to underrate her performance on the one hand and her concerns about her temporary reassignment to the Supply Section on the other. She does not provide any details regarding the conspiracy or any causal link between the conspiracy and her temporary reassignment. Similar to *Reid*, the Applicant in the current case has failed to identify a specific decision that had a direct and adverse impact on her contractual rights.

40. In light of the foregoing, the Tribunal concludes that this claim is not receivable because the Applicant has failed to identify an administrative decision within the meaning of art. 2.1(a) of the UNDT Statute.

² See also *Planas* 2010-UNAT-049.

b. The delay in releasing the results of an investigation into the Applicant's reassignment in 2016

41. The Applicant avers that there was supposed to be an investigation regarding the circumstances that led to her reassignment in 2016 but a year later, the results of this investigation have still not been released to her.

42. The Tribunal notes that although the Applicant requested protection from professional harassment after Mr. Lewyllie allegedly insulted her on 22 April 2016, she never requested an investigation into the circumstances surrounding her reassignment.

43. The Tribunal finds that the 29 April 2016 reassignment memorandum from Mr. Trojanovic clearly stated the reason for the reassignment, which was to give the Mission an opportunity to resolve her 22 April 2016 allegation of professional harassment against Mr. Lewyllie.

44. Further, the Applicant filed an application for suspension of action with the Tribunal on 3 May 2016³, under art. 2.2 of the UNDT Statute, seeking suspension of the decision to temporarily reassign her to the Supply Unit during the pendency of the investigation. Upon receipt of the Respondent's reply, the Tribunal gave the Applicant an opportunity to provide additional comments but she did not do so. Consequently, the Tribunal dismissed the application on 10 May after the Respondent undertook to suspend implementation of the contested decision.⁴

45. The Applicant then filed a motion for extension of time to file an application on 17 August 2016. This motion was registered as Case No. UNDT/NBI/2016/063. She described the contested decision as the decision to temporarily reassign her from IWH to the Supply Unit "under false pretenses".

46. The Tribunal refused her motion on 1 September 2016 by Order No. 426 (NBI/2016) on the basis that the administrative decision to temporarily reassign her had been taken, its content was sufficiently clear and inasmuch as the

³ This application was registered as Case No. UNDT/NBI/2019/032.

⁴ Order No. 209 (NBI/2016).

reassignment was of a temporary nature, the decision was final. Thus, the Applicant was in a position at that time to contest it.

47. In light of the fact that the said motion contained most of the information required by art. 8.2 of the UNDT Rules of Procedure, the Tribunal deemed it to be an incomplete application and instructed the Applicant to supplement her submission with the actions/remedies sought and supporting documentation by 15 September 2016. The Tribunal informed the Applicant that if she failed to comply with the 15 September 2016 deadline, her application would be dismissed.⁵

48. By Order No. 444 (NBI/2016) dated 29 September 2016, the Tribunal struck out Case No. UNDT/NBI/2016/063 because the Applicant failed to supplement her application on 15 September 2016 as ordered.

49. Since the Applicant did not request an investigation specifically into her reassignment and also failed to prosecute her case before the Tribunal on two occasions, it is vexatious of her to again present this as an issue for determination before the Tribunal. In light of the foregoing, the Tribunal finds and holds that the Applicant is estopped from re-litigating this issue. This claim is therefore not receivable.

c. The absence of an investigation into the Applicant's allegation of a hostile work environment; and

d. The Secretary-General's failure to take action against MINUSCA managers for engaging in prohibited conduct and to protect her rights as a staff member; and

e. The Secretary-General's persistent failure to take action against managers who have engaged in prohibited conduct; and

f. The Secretary-General's dereliction of his duty to act has allowed the MINUSCA managers to act with impunity.

⁵ Order No. 426 (NBI/2016).

50. The Tribunal has decided to consider these four claims as one for the sole reason that although they are phrased in different ways by the Applicant, the claims are one and the same. Simply put, the Applicant's claim is that the Respondent failed to conduct an investigation into her allegation of a hostile work environment and that this failure has violated her right to work in an environment free from discrimination, harassment and abuse of authority.

51. The first question here is whether the Respondent's alleged failure to conduct an investigation into the Applicant's allegation of a hostile work environment is an administrative decision.

52. In *Tabari* 2010-UNAT-030, the Appeals Tribunal held that "not taking a decision is also a decision".

53. Similarly, in *Nwuke* UNDT/2010/017, the applicant requested that the Dispute Tribunal, *inter alia*, compel the Administration to investigate his complaints of discrimination against senior management of the Economic Commission for Africa and order the Administration to treat him in a proper, non-discriminatory way and refrain from retaliation against him. The Dispute Tribunal held that the applicant did not contest an administrative decision and dismissed his application as irreceivable.

54. In *Nwuke* 2010-UNAT-099, the Appeals Tribunal held in relevant part that:

26. When a staff member files a complaint and makes accusations about administrative violations of law, the Administration can exercise its discretion and decide whether or not to undertake an (at least preliminary or summary) investigation. The investigation into management and administrative practices in general or into disciplinary cases is a matter within the discretion of the Administration. But that does not mean that the administrative decision to undertake, or not to undertake, an investigation cannot be subject to judicial review. Whether or not the UNDT may review such a decision depends on whether it falls into the UNDT's jurisdiction pursuant to Article 2(1) of the UNDT Statute.

...

30. A staff member has no right to compel the Administration to conduct an investigation unless such right is granted by the

Regulations and Rules. In such cases, it would be covered by the terms of appointment and entitle the staff member to pursue his or her claim even before the UNDT, and, after review, the Tribunal could order to conduct an investigation or to take disciplinary measures.

...

55. The Appeals Tribunal concluded that Mr. Nwuke had in fact challenged an administrative decision that was in non-compliance with his terms of appointment.

56. In the present case, the record shows that between 22 and 26 April 2016, both the Applicant and Mr. Buckley called for an investigation into the Applicant's complaint of professional harassment. Whilst Mr. Trojanovic's memorandum of 29 April made a general mention of resolving the Applicant's complaint to ensure that staff members work in a harmonious environment, it did not make any reference as to whether or not an investigation would be carried out.

57. Section 5.3 of ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority) places a duty on managers and supervisors to take prompt and concrete action in response to reports and allegations of prohibited conduct. Section 5.3 goes on to state that "failure to take action may be considered a breach of duty and result in administrative action and/or the institution of disciplinary proceedings".

58. It is clear from SGB/2008/5 that action of some kind was required from the MINUSCA management in relation to the Applicant's complaint. There is no indication however that any action was taken. Thus, the absence of a decision in this case was a decision. The Appeals Tribunal has made it abundantly clear that these omissions are reviewable administrative decisions. Again, in *Nwuke*, the Appeals Tribunal held that:

In light of ST/SGB/2008/5, Chapter XI of the Staff Rules, and the UNDT Statute, the Appeals Tribunal concludes that when the claims regard issues covered by ST/SGB/2008/5, the staff member is entitled to certain administrative procedures. If he or she is dissatisfied with their outcome, he or she may request judicial review of the administrative decisions taken. The UNDT has jurisdiction to examine the administrative activity (act or omission)

followed by the Administration after a request for investigation, and to decide if it was taken in accordance with the applicable law. The UNDT can also determine the legality of the conduct of the investigation.

59. Accordingly, the Tribunal finds and holds that the absence of an investigation into the Applicant's allegation of a hostile work environment is an administrative decision.

60. The Tribunal will now consider whether this claim is receivable.

61. The submission of a request for management evaluation is a mandatory first step that must be followed before an applicant may have recourse to the Dispute Tribunal to appeal against an administrative decision that falls within the scope of staff rule 11.2(a).

62. Article 8.1(c) of the Dispute Tribunal's Statute provides that an application shall be receivable if an applicant has previously submitted the requested administrative decision for management evaluation where required.

63. From the time that the Applicant requested an investigation into her allegation of professional harassment on 22 April 2016, she filed three requests for management evaluation on 1 May 2016, 22 October 2016 and 23 November 2016. These requests related to her reassignment from IWH to the Supply Unit, removal of negative comments from her 2015/2016 e-PAS and the Rebuttal Panel report and procedure. None of the requests related to the Respondent's failure to conduct an investigation into her complaint of professional harassment.

64. Although the Applicant is not a stranger before the Tribunal and knows from her past experience with the formal system of justice that she must submit her claims to the management evaluation system before proceeding to the Dispute Tribunal, she did not do so. She decided instead to come to the Tribunal as a first resort.

65. The Applicant has not complied with staff rule 11.2(a). As such, the Dispute Tribunal does not have jurisdiction *ratione materiae* under art. 8.1(c) of its Statute.

Judgment

66. The application is not receivable.

Observations

67. On 17 February 2017, the Applicant filed an application for suspension of action to the Tribunal seeking suspension of the MINUSCA's decision to transfer the Supply Section from the Service Delivery Service to the Supply Chain Management Service and the new functions assigned to her in that arrangement. This application was registered as Case No. UNDT/NBI/2017/011. The Tribunal, in its Order No. 045 (NBI/2017), noted that the Applicant had sought management evaluation of this issue twice, on 28 December 2016 and 16 February 2017, and had received responses from the Management Evaluation Unit (MEU) on 15 February 2017 and 17 February 2017, respectively. Since the Applicant had already received responses from MEU, the Tribunal refused her application.

68. With regard to the multiplicity of inarticulate applications that have been filed before this Tribunal on behalf of the present Applicant by the same legal counsel, the Tribunal needs to reiterate here that it is committed to dealing with genuine applications that come to it with a view to granting necessary reliefs to wronged and diligent applicants.

69. It is expected at all times that all applicants, especially those who have legal representation, present their applications with a good degree of articulation and a high sense of responsibility. This Tribunal is properly set up by law and has legal parameters for the applications it entertains. It is therefore not the forum for presenting soap box speeches and for making vague and insubstantial claims.

70. This Tribunal is a court of law and therefore it is the duty of the Applicant's counsel to properly school himself/herself in the relevant laws, procedures and processes before approaching this Tribunal. So far in a good number of his applications here, counsel's *modus operandi* appears to simply be

that of throwing the kitchen sink at the Tribunal and garnishing it with unsubstantiated allegations and fine speeches as to what ought to be.

71. The result is that the Tribunal is left to wade through his inarticulate applications spending lots of time and resources in an effort to make sense of it and to identify what ought to be the cause of action, any arguments or submissions and what remedies are sought. Eight years after the Tribunal commenced its work; the teething stages for any counsel are over and this anything-goes trend is no longer acceptable and will no longer be condoned.

72. Applications that are filed by legal counsel must be well-articulated and disclose proper causes of action, in other words, they must disclose the administrative decisions for which the Tribunal's review are sought. They must duly comply with relevant legal conditions and the forms for bringing applications provided on the Tribunal's website. It is not expected that an applicant's pleadings should cite laws except in the portion where arguments or submissions are presented. Any supporting documentary evidence referred to and relied upon in applications and which are in the applicant's custody must be properly annexed.

73. It is mention-worthy that where an applicant has legal representation, this Tribunal will readily presume that there are no concerns about the said applicant's access to justice. It needs also to be emphasized that the bringing of shoddy and vexatious applications and the abuse of the Tribunal's processes will not only result in the offensive applications being struck out but may be met by other sanctions that the Tribunal deems appropriate in the circumstances.

Judgment

74. The application is not receivable and is accordingly refused in its entirety.

(Signed)

Judge Nkemdilim Izuako

Dated this 28th day of June 2017

Entered in the Register on this 28th day of June 2017

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi