UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2017/002
Judgment No.: UNDT/2017/086
Date: 16 November 2017
Original: English

Before: Judge Nkemdilim Izuako

Registry: Nairobi

Registrar: Abena Kwakye-Berko

LEWIS

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Self-represented

Counsel for the Respondent:
Nicole Wynn, ALS/OHRM
Nusrat Chagtai, ALS/OHRM

Introduction

1. The Applicant is serving as the Chief Security Officer at the P-4 level with the United Nations Special Mission in Libya (UNSMIL). He filed an application on 5 January 2017 with the United Nations Dispute Tribunal (UNDT/the Tribunal) in Nairobi contesting decisions relating to his 2015/2016 e-performance document (e-PAS).

Procedural history

2. The Respondent filed a reply to the application on 6 February 2017 in which he challenged the receivability of the application and addressed the merits of the Applicant's claim.

3. The Tribunal found the application receivable in Judgment No. UNDT/2017/049.

4. Pursuant to the directives in Order No. 120 (NBI/2017), the parties informed the Tribunal on 28 July 2017 that they were not amenable to a mediated settlement of the matter. Consequently, the Tribunal informed the parties, by its Order No. 132 (NBI/2017) of its decision to hold an oral hearing in January 2018. Additionally, the Tribunal ordered: (i) the Respondent to provide documentation of the roll back of the Applicant's 2015/2016 e-PAS; and (ii) the parties to submit their witness lists and any interlocutory applications in preparation for the hearing.

5. The parties complied with Order No. 132 on 28 September 2017 with the Respondent moving the Tribunal to reject the Application as moot because the 2015/2016 e-PAS that the Applicant was challenging had been canceled. The Applicant submitted his list of witnesses on the same day.

Relevant facts

6. The Applicant joined UNSMIL on 18 April 2015. His First Reporting Officer (FRO) was Mr. Paepae Wiki, the UNSMIL Chief Security Advisor (CSA), and his SRO was Mr. Martin Kobler, the UNSMIL Special Representative of the Secretary-General (SRSG).

7. For the performance evaluation period 2015/2016, Mr. Wiki gave the Applicant an overall rating of "successfully meets expectations". The copy of this e-PAS, which was submitted by the Applicant as an annex to his application was not signed by him, the FRO nor the SRO.

8. Mr. Kobler evaluated the Applicant's performance as "partially meets expectations" and provided very strong comments in support of this negative rating. He went on further to recommend the institution of a performance improvement plan (PIP) to address the Applicant's performance shortcomings.

9. The Applicant became aware of Mr. Kobler's comments on 21 August 2016 and submitted a request for management evaluation on 30 August 2016.

10. On 29 September 2016, the Applicant's new FRO, Mr. Filipo Tarakinikini, UNSMIL's CSA, informed him by email that "[…] based on MEU feedback, your previous FRO and SRO are working to resolve and roll back your previous performance evaluation and produce a new performance document for 2015-2016".

11. The Management Evaluation Unit (MEU) informed the Applicant, by a letter dated 7 October 2016, that his request for management evaluation was not receivable since no adverse decision directly affecting his terms of appointment had been taken based on his 2015/2016 performance appraisal.

12. The Applicant filed the current application on 5 January 2017.

13. On 28 September 2017, the Respondent confirmed that the Applicant's e-PAS for 2015/2016 had been cancelled and that a new performance evaluation document covering that performance period had been finalized and signed by the Applicant and his supervisor.

Considerations

14. The Respondent is seeking that the application be dismissed on the basis that the Applicant's 2015/2016 e-PAS has been rolled back and replaced by a new and more favourable performance evaluation document which is essentially the relief sought by the Applicant in his application filed on 5 January 2017.

15. The Respondent's filings of 28 September 2017 clearly exhibit the new e-PAS in respect of the Applicant for the 2015-2016 performance cycle which replaced the earlier one with adverse comments by the SRO.

16. The Applicant on the other hand filed his list of 16 witnesses that he wants the Tribunal to hear evidence from. This can only mean that he intends to proceed to prosecute his case as filed on 5 January 2017. In other words, the Applicant's position is that despite the roll-back of his 2015-2016 e-PAS, he still has a live course of action. Eleven out of the 16 witnesses are supposed to provide evidence on the alleged hostile working environment and three of the witnesses are supposed to provide evidence on the stress and anxiety the Applicant claims to have suffered due to the hostile working environment.

17. Does the Applicant still have a live course of action or should this application be deemed moot and dismissed as argued by the Respondent?

18. Before the Tribunal deliberates on the issue of mootness, it must first determine the decision or decisions being contested by the Applicant.

19. In his application, the Applicant describes the decisions he is challenging as follows:

> a. The decision by [Mr. Kobler] to contest the rating and comments given by his FRO with unsubstantiated comments which in effect attempts to change the overall rating from "successfully meets expectations" to "partially meets expectation" in contravention of ST/AI/2010/5 (Performance management and development system);
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> b. The decision to use the Applicant's e-performance in assessing/appraising his FRO in contravention of ST/AI/2010/5;
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> c. The decision to use bad faith to negatively influence future performance appraisals to the detriment of the Applicant; and

d. The decision [by Mr. Kobler] to change the rating of the FRO is prima facie unlawful and tainted by extraneous factors and hence abuse of office.

20. The Tribunal finds that the Applicant's case that the "decision to use the Applicant's e-performance in assessing/appraising his FRO in contravention of ST/AI/2010/5" is not a contestable decision within the meaning of art. 2.1 of the UNDT Statute because it does not form part of the terms and conditions of employment of the Applicant. This is a matter that relates solely to the Applicant's FRO and the terms and conditions of his employment with the Organization.

21. The Tribunal finds that the "decision to use bad faith to negatively influence future performance appraisals to the detriment of the Applicant" is also not a contestable decision within the meaning of art. 2.1 of the UNDT Statute because the Applicant is merely speculating on what may or may not happen in the future. Additionally, bad faith is not an administrative decision at all and cannot be challenged, rather it may be alleged to have tainted an administrative decision and if proven may form the basis for a judicial relief.

22. The Tribunal finds that the Applicant's claim that the "decision [by Mr. Kobler] to change the rating of the FRO is prima facie unlawful and tainted by extraneous factors and hence abuse of office" is receivable only to the extent that it challenges the rating in the e-PAS. The Tribunal further holds that the Applicant's contention that the decision to change the FRO's rating was "tainted by extraneous factors and hence abuse of office" is simply a submission and/or an argument being employed by the Applicant to advance his case. The Applicant did not plead any facts to establish "extraneous factors and abuse of office."

23. Additionally, the Tribunal notes that the Applicant pled in his facts of the case that Mr. Kobler sought to sabotage his performance evaluation because he harbors animus against him and that Mr. Kobler's "bad faith maneuvers" have created a hostile working environment for him. Again, the Applicant does not provide any particulars or incidents to support, prove and/or explain his claim of "animus", "bad faith maneuvers" and "hostile working environment".

24. The Applicant merely submitted an email dated 27 February 2016[1] as proof of Mr. Kobler's animus against him. The Tribunal finds that this email is not proof of Mr. Kobler's animus towards the Applicant because it is addressed to all UNSMIL international staff and deals with general issues such as: organization of work for senior managers (i.e. Mr. Kobler, the Deputy Head of Mission, the Chief of Staff, the Director of Mission Support and section heads); expectation management; future relocation of staff to Tripoli; the mode for internal communication; staff happiness in the mission and the Mission's "mission statement".

25. It is a general principle of law that he who alleges must prove. In *Applicant* UNDT/2013/177, this Tribunal held that:

> Where an Applicant alleges that an agreement was imposed upon him by duress, the burden lies on him or her to convince the Tribunal that such is the situation. No particulars have been tendered in support of this claim, no reference has been made either in his pleadings or other documents as to the nature of the threats. It is not known whether the alleged threats are physical or psychological. The Applicant in this case has not gone beyond merely making this assertion and therefore this claim must fail.[2]

26. In the present matter, the Applicant has merely made claims and assertions without tendering any evidence to support them. The Applicant's application, which contains his pleadings, should set out clearly the facts upon which he is relying when he claims that there was "animus", "bad faith maneuvers" and a "hostile working environment". Seeing that he is making allegations that would ordinarily fall under the dominion of ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority), he cannot, at this stage, bring in witnesses during a hearing to speak to facts that he has not pled in his application. Since the Applicant has not provided any facts in his application that support his allegation of a hostile working environment, this claim must fail.

[1] Annex 7 to the application.
[2] This portion of the UNDT judgment was affirmed by the United Nations Appeals Tribunal in *Kadri* 2015-UANT-512.

27. In light of the foregoing, the Tribunal finds and holds that the case of the Applicant is solely in relation to the negative comments and rating of the SRO in his e-PAS. All other issues raised in his Application are not receivable.

28. The Applicant is seeking the following remedies:

a. A declaration that Mr. Kobler's comments constitute an express or implied administrative decision;

b. A declaration that Mr. Kobler's actions contravene the United Nations Staff Regulations and Rules;

c. A declaration that Mr. Kobler interfered with the duties of the Applicant's FRO and as such contravened ST/AI/2010/5;

d. Compel Mr. Kobler to withdraw his comments in the Applicant's 2015/2016 e-PAS;

e. A declaration that Mr. Kobler's negative comments and recommendations are not binding to future e-performances;

f. An inference that Mr. Kobler's negative comments in the Applicant's 2015/2016 e-PAS is tainted with bad faith;

g. Compensation for mental anguish and moral distress; and

h. Any other orders, including costs, that will enable the Applicant to work harmoniously with the rest of the United Nations system.

29. In *Kallon* 2017-UNAT-742, the United Nations Appeals Tribunal (the Appeals Tribunal) made the following observations on the mootness doctrine:

> 44. A judicial decision will be moot if any remedy issued would have no concrete effect because it would be purely academic or events subsequent to joining issue have deprived the proposed resolution of the dispute of practical significance; thus placing the matter beyond the law, there no longer being an actual controversy between the parties or the possibility of any ruling having an actual, real effect. The mootness doctrine is a logical corollary to the court's refusal to entertain suits for advisory or speculative opinions. Just as a person

> may not bring a case about an already resolved controversy (*res judicata*) so too he should not be able to continue a case when the controversy is resolved during its pendency. The doctrine accordingly recognizes that when a matter is resolved before judgment, judicial economy dictates that the courts abjure decision.
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> 45. Since a finding of mootness results in the drastic action of dismissal of the case, the doctrine should be applied with caution. The defendant or respondent may seek to "moot out" a case against him, as in this case, by temporarily or expediently discontinuing or formalistically reversing the practice or conduct alleged to be illegal. And a court should be astute to reject a claim of mootness in order to ensure effective judicial review, where it is warranted, particularly if the challenged conduct has continuing collateral consequences. It is of valid judicial concern in the determination of mootness that injurious consequences may continue to flow from wrongful, unfair or unreasonable conduct.

30. In *Gehr* 2011/UNDT/211, this Tribunal held that:

> 37. In cases where the Administration rescinds the contested decision during the proceedings, the applicant's allegations may be moot. This is normally the case if the alleged unlawfulness is eliminated and, unless the applicant can prove that he or she still sustains an injury for which the Tribunal can award relief, the case should be considered moot.

31. In its judgment on receivability in this case, the Tribunal found that the SRO's adverse comment in the earlier 2015/2016 e-PAS which the Applicant challenged constituted an administrative decision that gave rise to an extension of contract of only six months for the Applicant. That judgment effectively granted the first relief sought by the Applicant in this case.

32. With the successful roll-back of the Applicant's 2015/2016 e-PAS, there no longer exists any basis for the consideration or grant of reliefs 27(b) and (d) above.

33. The remedy sought by the Applicant at paragraph 27(c) cannot be granted since it relates to a decision that is not contestable under art. 2.1 of the UNDT Statute and granting the remedy at paragraph 27(e) would be nothing but a purely academic exercise. The remedies sought by the Applicant at paragraphs 27(f-h) cannot be granted because the Tribunal has previously concluded that the Applicant

failed to plead any facts in his application in support of his allegation of a hostile working environment.

Judgment

34. The Tribunal is of the view that in the prevailing circumstances, this application is no longer live. It is accordingly struck off.

(Signed)

Judge Nkemdilim Izuako

Dated this 16th day of November 2017

Entered in the Register on this 16th day of November 2017

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi