UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2017/086
Judgment No.: UNDT/2019/084
Date: 14 May 2019
Original: English

Before: Judge Goolam Meeran

Registry: New York

Registrar: Nerea Suero Fontecha

RUYFFELAERE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

ON RECEIVABILITY

Counsel for Applicant:
Self-represented

Counsel for Respondent:
Alan Gutman, ALD/OHR, UN Secretariat

Introduction

1. On 23 August 2017, the Applicant, a Senior Medical Officer in the Medical Services Division ("MSD"), Department of Management ("DM") in New York, filed an application contesting what he considered to be an implied decision by the Under-Secretary-General for Management ("USG/DM") not to formally respond to his complaint and failing to establish a fact-finding panel pursuant to ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority).

2. The Respondent contends that the application is not receivable because the Applicant failed to request management evaluation within the period of 60 days from notification of the decision and, if the Tribunal were to find the claim receivable, it is without merit.

3. The case was reassigned to the undersigned judge on 1 April 2019.

4. Given the huge volume of documents, the number of factual issues to be explored in relation to the substantive merits of the claim, the lapse of time since June 2013 when the Applicant first considered that he had cause to complain about prohibited conduct and the deleterious effect of further avoidable delay on the Applicant's health as well as the need for an expeditious and just disposal of the proceedings and judicial economy, the Tribunal decided that in the particular circumstances of this case there should be a preliminary hearing to determine the issue of receivability. The preliminary hearing was held on 6 May 2019.

Facts relevant to receivability

5. The following relevant facts were adduced from the record and the oral evidence provided at the preliminary hearing at which the Applicant and Mr. Christian Saunders ("CS"), the then Director of the Office of the USG/DM, gave evidence.

6. On 15 September 2014, the Applicant submitted a complaint under ST/SGB/2008/5 to the Office of Internal Oversight Services ("OIOS") alleging that since June 2013 he had been subjected to harassment and abuse of authority by his second reporting officer, the Medical Director of MSD.

7. On 23 September 2014, OIOS informed the Applicant that it had decided to refer the matter to the USG/DM. It should be noted that for purposes of ST/SGB/2008/5 the responsible official in this case was the USG/DM.

8. On 5 July 2015, CS, who was in New York, and the Applicant, who was in Mali, had a telephone conversation. The Respondent's assertion, at para. 3 of the reply, that notification of the decision was first made during the 5 July 2015 telephone conversation, is not supported by CS's testimony. This element of the reply is rejected. However, the assertion that such notification was effected in a subsequent face-to-face meeting between the Applicant and CS on 19 November 2015, in New York, was supported by CS's testimony but challenged in cross examination by the Applicant. The resolution of this conflict of recollection, interpretation and understanding was a central issue at the preliminary hearing.

9. At the preliminary hearing the parties confirmed that over the course of time the Applicant and CS had several discussions regarding what the Applicant felt was ongoing harassment by the Director of MSD. It was not challenged that the Applicant had two outstanding appraisals as the Senior Medical Officer in Bamako, Mali, and the Applicant's reliance on that as evidence of his important contribution in difficult field missions was not misplaced. As a result of CS's understanding of the Applicant's frustrations and his invaluable contribution as an emergency physician, CS explained that he formed the view that the Applicant was most effective as an emergency physician in the field rather than in a desk job for which he did not quite fit in. Given the irretrievable breakdown in the relationship between the Applicant and the Medical Director, CS formed the view that the Applicant was better off working in the field commensurate with his skills and experience. He expressed his surprise that given the ongoing tension in their relationship that the Applicant would

wish to work in New York in close proximity of the Medical Director. In the circumstances, CS put forward a number of proposals during the 5 July 2015 phone call to the Applicant for an alternative resolution of the dispute which included a posting to a senior position in other field missions or an agreed separation on suitable terms.

10. On 19 November 2015, CS and the Applicant had a meeting in person in New York. At this meeting, CS's evidence was that he made the Applicant aware that his complaint was considered in accordance with the office procedures and that he reviewed the complaint and advised the USG/DM that there were insufficient grounds to warrant a fact-finding investigation and that the USG/DM agreed. He was left to inform the Applicant in accordance with the normal office procedures. CS further clarified that the USG/DM had a busy work schedule and delegated responsibility for reviewing complaints to him as the Director of the Office of the USG/DM.

11. The Tribunal finds on the basis of the Applicant's evidence that he was expecting to see the USG/DM or to hear directly from him. During the preliminary hearing, the Applicant was adamant that he should have heard from the USG/DM and not from CS notwithstanding that he was the Director of the Office of the USG/DM. CS's response to the Applicant in cross examination was that he had made the Applicant aware that the USG/DM and CS had reviewed the Applicant's case.

12. The Applicant's version of events is not entirely inconsistent with CS's evidence. He said that until July 2015 he had frequent contact with CS and told him that he never had a response from the responsible official. He said that CS's response was that action was not going to be taken against the Medical Director and that the complaint was reviewed with the legal office. The Applicant expressed his exasperation saying that he could not believe what he was being told and that he needed to hear it from the USG/DM as the responsible official. He asked CS to pass on a message to the USG/DM that he wished to meet him to discuss the complaint.

13. The Applicant said that in November 2015, CS offered to send him a response in writing. He refused this offer because CS was not the responsible official and he wanted to hear directly from the USG/DM, who, as the responsible official under ST/SGB/2008/5, should be contacting him directly with his decision. The Applicant made it clear that he was still waiting to hear from the USG/DM and that he wanted to discuss his complaint with the USG/DM. The Applicant stated that CS responded by saying that the USG was very busy.

14. On 5 May 2016, the Applicant submitted to the Ethics Office a request for protection against retaliation by the Medical Director.

15. On 26 August 2016, the Ethics Office denied the request for protection and informed the Applicant that his claim did not raise a *prima facie* case that any protected activity was a contributing factor in causing any alleged retaliation.

16. On 25 April 2017, the Applicant submitted a request for management evaluation challenging the Administration's excessive delay in taking any action in response to his complaint.

17. On 12 July 2017, the Applicant received an e-mail from CS, as the Director of the Office of the USG/DM, which stated that the incidents described in the Applicant's complaint did not provide sufficient grounds to warrant a formal fact-finding investigation. The Applicant relies upon this email as the date that he was notified of the decision.

18. On 20 July 2017, the Applicant submitted an amended management evaluation request which included CS's e-mail of 12 July 2017.

The issue

19. The issue to determine at the preliminary hearing is whether the request made by the Applicant, on 25 April 2017, for a management evaluation was within the period of 60 days from the date that he was notified of the decision that he is challenging.

Considerations

20. This Judgment is concerned solely with the question whether the Applicant submitted his request for management evaluation within 60 days of receipt of notification of the contested decision or the date on which he first came to know of it?

21. The Tribunal recalls staff rule 11.2, and in particular, para. (c):

> (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.
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> …
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> (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*. This deadline may be extended by the Secretary-General pending efforts for informal resolution conducted by the Office of the Ombudsman, under conditions specified by the Secretary-General. (emphasis added)

22. The consistent jurisprudence of the Appeals Tribunal is that there must be a timely request for management evaluation prior to submitting an application to the Tribunal (see, Dzuverovic 2013-UNAT-338; Kouadio 2015-UNAT-558).

23. It is also settled law that the time limit of 60 days for requesting management evaluation begins to run from the date of notification of the decision being challenged. The Tribunal does not have power to waive the deadlines for the filing of requests for management evaluation or to make any exception to it (see, *Costa* 2010-UNAT-036; *Christensen* 2013-UNAT-335).

24. The Appeals Tribunal has held that a staff member has no general right to compel the Administration to conduct a fact-finding investigation where none is warranted, and that determining whether there are sufficient grounds to warrant a

formal fact-finding investigation is a matter within the discretion of the responsible official (*Nwuke* 2010-UNAT-099).

25. An examination to determine the question when did the Applicant receive notification of the contested decision will require factual findings based preferably on the availability of a written notification, failing which the Tribunal will examine any available contemporaneous documentary record or other persuasive written evidence together with any relevant oral evidence. In the absence of a written decision and a contemporaneous record evidencing the decision, as in this case, the Tribunal is left with no alternative but to rely on any credible oral testimony of the Applicant and the responsible official and/or a senior official acting on behalf of and with the consent of the responsible official. It will generally be unsatisfactory, in such circumstances, to decide the issue of notification solely on documents, particularly if they are created for the purpose of the proceedings in question or documents the authenticity and/or the relevance of which could reasonably be called into question. A hearing will normally be considered obligatory where there is no persuasive and/or credible contemporaneous record.

26. By Order No. 69 (NY/2019) dated 24 April 2019, the Tribunal ordered the production of contemporaneous documents recording the Applicant's complaint being received and considered by the USG/DM, together with the USG/DM's instructions to the Director of the Office of the USG/DM to communicate the decision to not initiate an investigation of the Applicant’s complaint, and the date and means by which this decision was notified to the Applicant.

27. The Respondent’s failure to produce such a record was a major stumbling block in the Tribunal’s consideration and the Applicant and CS were expected to recall precise dates and conversations several years after the events. This fact alone should give the Organization cause for concern that there is no requirement for decisions to be notified in writing. It has proven to be costly and arguably unfair to the Applicant as well as to CS both of whom had to rely on memory of events, the significance of which may not fully have been appreciated at the time.

28. The test which the Tribunal applied is to examine such evidence as was available to ascertain whether the Applicant was given the clear and unambiguous message that upon a review of his complaint the responsible official decided that there were insufficient grounds to justify a fact-finding investigation.

29. It is common ground that the Applicant was insisting that he had to hear directly from the USG/DM, as the responsible official. It is also not in dispute that the Applicant was told that no action was going to be taken against the Medical Director and that she was to remain in post. The Tribunal accepts CS's evidence that he informed the Applicant that the USG/DM was very busy and not going to see him.

30. Notwithstanding the lack of documentary evidence of a formal referral from the USG/DM to CS as the Director of the USG's office and a file note or other contemporaneous record of a discussion between the two evidencing the agreed position that there was insufficient evidence to justify a fact-finding investigation, the Tribunal considered and accepted CS's testimony describing the normal procedures within the office of the USG/DM. The Tribunal is satisfied that the USG/DM's office has a heavy workload and that the Director had delegated responsibility to review complaints of prohibited conduct and to advise the USG/DM whether there were sufficient grounds to initiate a fact-finding investigation.

31. Whether the decision arrived at was procedurally correct or was in any way tainted by impermissible considerations or otherwise perverse cannot be examined by the Tribunal unless the decision was subjected to management evaluation within 60 days of notification of the decision. The Tribunal is satisfied that CS informed the Applicant in or about November 2015 that a decision had been taken not to investigate his complaint. This was understood by the Applicant but was not accepted by him as constituting valid notification because he did not receive it or hear it directly from the USG/DM who was the responsible official. Whilst the Tribunal understands the Applicant's argument, the fact is that he knew in November 2015 that a decision had been made that his complaints against the Medical Director were not going to be investigated and that he was told that it was not going to be further

reviewed. The Tribunal finds that the 12 July 2017 decision contained in the email from CS to the Applicant in material respects was no different from what he had been told previously and particularly on or about 19 November 2015. The email was a reiteration of the earlier decision. The Appeals Tribunal has held that a staff member's request for a reiteration of an administrative decision does not reset the time limits for contesting the decision (*Rosana*, 2012-UNAT-273). Further, the Applicant's requests to have a meeting with the USG/DM or to hear directly from him were refused. Finally, when CS offered to send him a written communication, the offer was refused by the Applicant because he did not want to hear from CS but from the USG/DM.

32. The Applicant's request for management evaluation was made on 25 April 2017 which is well outside the requisite time limit of 60 days from notification.

33. Given that the Applicant believed that he had to receive the decision directly from the USG/DM he ought reasonably to have concluded that there was an implied decision not to commission a fact-finding enquiry long before his request for management evaluation on 25 April 2017, two years and seven months after he was notified by OIOS that they had referred his complaint to the USG/DM.

34. Whilst the Tribunal deals with the Applicant's contention that there was an implied decision not to investigate, the Tribunal's primary factual finding, based on oral testimony, is that there was a clear oral notification on or about 19 November 2015 and he ought to have submitted a request for management no later than 18 January 2016. Alternatively, any notion that he had entertained that there was an implied decision would reasonably have crystallised long before his request for management evaluation on 25 April 2017.

35. Although the Tribunal was compelled to decide this case on the basis of oral testimony the Tribunal wishes to record its view that the interests of both staff members and the decision maker/s are best served by a contemporaneous record of the fact that there was a review under the guidance or delegated authority of the responsible official and that the decision was notified to the staff member on a

particular date. Ideally, irrespective of whether it is mandated by the Staff Rules or not, the decision is best communicated in writing. Not only would this be in conformity with good administrative practice, but it will best serve the interests of a just and expeditious consideration and determination of any formal complaint.

36. The Tribunal finds that the Applicant's claim is not receivable, and that the Tribunal does not have jurisdiction to consider the respective contentions of the parties on the merits of the case.

Conclusion

37. It is the Judgment of the Tribunal that the claim is not receivable. The application is rejected.

(*Signed*)

Judge Goolam Meeran

Dated this 14th day of May 2019

Entered in the Register on this 14th day of May 2019

(*Signed*)

Nerea Suero Fontecha, Registrar