



Before: Judge Agnieszka Klonowiecka-Milart

Registry: Nairobi

Registrar: Abena Kwakye-Berko

APPLICANT

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Edward Patrick Flaherty

Counsel for the Respondent:
Marisa Maclellan, UNHCR

Introduction

1. On 15 August 2020, the Applicant, a former High Commissioner's Representative, at the P-5, step 13 level, working with the United Nations High Commissioner for Refugees ("UNHCR") in Harare, Zimbabwe, filed an application before the Dispute Tribunal.¹

2. He contests three decisions, namely: (i) the decision by the Inspector General's Office ("IGO"), UNHCR, to continue to conduct an investigation while he was on certified, service incurred sick leave; (ii) the decision of the Department of Human Resources ("DHR"), UNHCR, to refuse to empanel a medical board to determine his fitness to respond to the claims of misconduct; and (iii) the decision to dismiss him for misconduct.²

3. The Respondent filed a reply on 16 September 2020, where it is argued that the the contested decisions (i) and (ii) are not receivable, while decision (iii) is without merit.

4. On 14 September 2020, the Tribunal issued Order No. 174 (NBI/2020), and among others, directed the Applicant to file a response to the Respondent's reply.

5. The Applicant complied and filed the requested response on 10 October 2020.

6. The Tribunal has reviewed the parties' submissions and ordered separating the Applicant's claims and disposing of them separately (Order No. 060 (NBI/2022). To this end, this judgment will address the Applicant's claims (i) and (ii), while claim (iii) will be further examined.

¹ Application, section II.

² Application, section V.

Facts

Facts surrounding the IGO's decision

7. On 9 April 2019, the IGO received a report of misconduct implicating the Applicant.³ On 6 June 2019, the Applicant was informed that he was a subject of an investigation being conducted by the IGO.⁴ On the same day, 6 June 2019, the Applicant was placed on an Administrative Leave with Full Pay (“ALWFP”) pending completion of the investigation.⁵

8. On 3 May 2019, the IGO started its investigation. Between 27 May and 9 September 2019, the IGO investigators interviewed eight staff members. The Applicant was interviewed two times, on 25 and 29 July 2019.⁶

9. On 6 August 2019, Ms. Elisa Reuter, the IGO investigator sent the Applicant the record of his interview for his review and requested him to provide his comments by 9 August 2019. By a return email on the same day, that due to the length of the record, the Applicant requested an extension of time to respond until 16 August 2019.⁷

10. On 15 August 2019, the Applicant wrote to the investigator stating, “I have not been able to work on the transcript as I am very ill. I will be sending a medical certificate from my doctor to JMS [Joint Medical Services] shortly”.⁸

11. On 16 August, 23 August and 4 September 2019, the IGO reminded the Applicant to submit his comments. On 5 September 2019, the Applicant replied stating: “I will return the interview report with comments when I am medically able to do so.”⁹

12. On 16 September 2019, IGO shared a copy of the draft investigation report with the Applicant for his comments. IGO reiterated to the Applicant that “kindly note that

³ Investigation report, section A, para. 1.

⁴ Application, section VII, para. 1.

⁵ Application, annex 5.

⁶ Annex 116 of the investigation report.

⁷ Annex 117 of the investigation report.

⁸ *Ibid.*

⁹ *Ibid.*

this is an opportunity given to you, not an obligation, and should the IGO not receive comments, the matter will proceed without these [them]”.¹⁰

13. On 17 September 2019, the Applicant responded stating that; “I am not in a position to review and comment as I am sick. Please consult Dr. Ling Kituyi about my medical condition.”¹¹

14. Thereafter, the IGO proceeded with its investigation and produced the report on 20 September 2019. The IGO concluded that the evidence supported a finding that the Applicant had engaged in prohibited conduct.¹²

Facts of the DHR decision

15. On 6 December 2019, the Applicant sent to Dr. Ling Kituyi, Head of Service, Staff Health and Welfare, a medical report, copying Ms. Catty Bennet Sattler, the Director, Division of Human Resources (“DHR”).¹³

16. On 9 December 2019, Dr. Kituyi responded to the Applicant and advised him “Like before, I teak [take] note of your health issues but as you are already on another type of paid leave, we will not certify it is [as] a sick leave in the system, since one can only have one type of leave at a time”.¹⁴

17. On 11 December 2019, via an international shipping company, DHL, the DHR, sent to the Applicant a letter containing the allegations of misconduct and the investigation report.¹⁵

18. On 18 December 2019, the Applicant acknowledged receipt of packages containg files, and stated “unfortunately, I did not study the material because of my ill

¹⁰ Annex 017 of the investigation report.

¹¹ *Ibid.*

¹² Reply, annex 1(a), (the investigation report).

¹³ Reply, annex 6.

¹⁴ *Ibid.*

¹⁵ Application, annex 8.

health”.¹⁶

19. Following the acknowledgment of receipt of the letter containing the allegations and the investigation report, on 20 December 2019, UNHCR invited the Applicant to respond to the charges by 18 January 2020.¹⁷

20. On 2 January 2020, the Applicant requested an extension of time to respond due to “serious illness”. On 13 January 2020, the DHR, requested confirmation from the Applicant as to the length of extension that he required. On 17 January 2020, the Applicant responded and stated that he would need an extension of at least eight months.¹⁸

21. On 28 January 2020, the DHR, responded to the Applicant stating:

Following consultation with Dr. Kituyi, please be informed that I have decided to grant you an extension of one month from your initial due date of 20 January, i.e. until 20 February 2020. Please note that if no response is received by 20 February 2020, the matter will nevertheless proceed.¹⁹

22. On 29 January 2020, the Applicant responded and emphasized “as stated and confirmed by my doctor, I am unable to defend myself at this time due to serious mental health challenges”.²⁰

23. On 11 February 2020, the DHR wrote to the Applicant indicating that she had been advised by Dr. Kituyi that, based on the submitted medical reports and Dr. Kituyi’s own interactions with the Applicant, her professional medical opinion was that the Applicant was able to read, understand and respond to the charge letter containing allegations of misconduct. Accordingly, the DHR granted the Applicant one last extension of time to 11 March 2020.²¹

¹⁶ *Ibid.*

¹⁷ Reply, annex 7.

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ *Ibid.*

24. On 6 March 2020, through his Counsel, the Applicant wrote to DHR insisting that he was not medically fit to perform any professional duties including responding to the allegations and that should UNHCR insist that he responds to the allegations by 11 March 2020 while still ill; the Applicant demanded that a medical board be empaneled to address the divergence in opinion concerning his ability to perform any professional duties, including responding to the said allegations.²²

25. On 8 April 2020, the DHR responded and reiterated, among others, that based on the submitted certificate, and the previously submitted medical reports, as well as Dr. Kituyi's own interactions with the Applicant, Dr. Kituyi's professional medical opinion remained that the Applicant could read, understand and respond to a charge letter containing allegations of misconduct. The DHR further noted that the Applicant was assisted by a lawyer who could assist in finalizing his response. The DHR provided one final extension of time for the Applicant to respond, to 28 April 2020.²³

26. By a return email, on the same day, the Applicant's Counsel reiterated his request to empanel a medical board.²⁴

27. On 21 April 2020, the DHR, recalling Dr. Kituyi's email to the Applicant on 9 December 2019, stressed that the Applicant's administrative status was that of administrative leave with pay and not of sick leave. Accordingly, staff rule 6.2 (j), did not apply as sick leave was not refused, nor the unused portion of sick leave was withdrawn. The DHR reiterated the 28 April 2020 deadline for UNHCR to receive the Applicant's response to the charges.²⁵

28. On 28 April 2020, through his Counsel, the Applicant maintained that he was unable to respond to the charges, regardless of his administrative status. The Applicant reiterated his request to empanel a medical board, should UNHCR continue to dispute

²² Application, annex 2.

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ *Ibid.*

his incapacity to engage in any work-related duties, including providing his comments.²⁶

29. On 22 May 2020, the Applicant was sent the sanction letter.²⁷

30. On 11 June 2020, the Applicant requested management evaluation of the three decisions as contained in paragraph 2 above.²⁸ On 24 July 2019, the Deputy High Commissioner, UNHCR, provided the management evaluation, finding that the request was not receivable.²⁹

Receivability

The Respondent's submissions

31. The Respondent contends that the application against the IGO decision is not receivable given that a decision to continue an investigation is not an administrative decision which produced direct legal consequences. Only once a sanction has been issued may the staff member raise a challenge. The Tribunal may only review the investigative process as part of this challenge.

32. Regarding the second claim, where the Applicant challenges the DHR decision refusing to empanel a medical board, the Respondent submits that it is not receivable *rationae materiae*. Whereas the Applicant states that the contested decisions were taken on 7 and 22 May 2020, this is not correct. DHR's refusal is not a stand-alone administrative decision. Even if it were, the 7 May 2020 email from the DHR merely reiterated the content of the April emails. Therefore, by filing his management evaluation request on 11 June 2020, the Applicant was more than 60 days beyond both the 8 and 21 April 2020 communications from the DHR. The Tribunal does not have jurisdiction to waive the time limits for management evaluation.

²⁶ *Ibid.*

²⁷ Application, annex 3.

²⁸ Reply, annex 9.

²⁹ Application, annex 4.

The Applicant's submissions

33. The Applicant contends that the IGO's decision to continue the investigation was a procedural violation which necessarily resulted in a direct legal consequence, that is, his dismissal and as such it is receivable. Relying on this Tribunal's Order in *Malhotra*³⁰, the Applicant maintains that decisions taken during a disciplinary process are appealable.

34. With regard to DHR decision to not empanel a medical board, the Applicant submits that, in her email of 7 May 2020, DHR stated "I have again requested the advice of the Staff Health and Wellbeing Service, on the most recent medical certificate provided by you. Based on their professional opinion, I remain of the view that Mr. T [Applicant] maintains the capacity to respond to the allegations of misconduct". Therefore, since the DHR made a renewed request for advice, based on a newly submitted medical certificate, this can be viewed as a new decision. Even if the 8 April 2020 decision can be considered the original decision on the matter, the new request and response as of 7 May 2020 renders the claim receivable as the Applicant's management evaluation request was made within 60 days of that decision.

Considerations

35. The Tribunal recalls that receivability is determined by strict rules, in the application of which the Dispute Tribunal exercises no discretion, among them the requirement that the decision have direct impact on an applicant's terms of employment and the requirement of a timely request for management evaluation. It is firmly established in the jurisprudence that applications against decisions having no direct impact on an applicant's terms of employment are not receivable. This concerns both decisions that present a potential for producing a negative effect, such as incorrect entry or refusal to correct the record in Umoja³¹ and decisions that are essential prerequisites

³⁰ *Malhotra* Order No. 141 (NY/2020), para. 12.

³¹ *Avramoski* 2020-UNAT-987.

leading to a further decision that produces a negative effect on the terms of appointment.³²

36. In the present case, neither the decision to continue investigation (refusal to suspend it) despite the claimed medical condition of the Applicant, nor the refusal to convene a medical board to examine it, had produced a decision of direct negative consequences for the Applicant. The impact, if any, of these decisions on the outcome of the disciplinary process will be examined in relation to his application against the disciplinary measure.

JUDGMENT

37. The application, in relation to claims described in paragraph 2 as (i) and (ii) is dismissed as not receivable.

(Signed)

Judge Agnieszka Klonowiecka-Milart
Dated this 24th day of May 2022

Entered in the Register on this 24th day of May 2022

(Signed)

Eric Muli, Legal Officer, for
Abena Kwakye-Berko, Registrar, Nairobi

³² *Lee* 2014-UNAT-481, para. 49, *Loeber* 2018-UNAT-844.