



Before: Judge Agnieszka Klonowiecka-Milart

Registry: Nairobi

Registrar: Abena Kwakye-Berko

UZELE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

Self-represented

Counsel for the Respondent:

Nicole Wynn, AS/ALD/OHR, UN Secretariat

Maureen Munyolo, AS/ALD/OHR, UN Secretariat

Introduction

1. The Applicant is a Transport Assistant at the G-4 level, working with the United Nations Stabilization Mission in the Democratic Republic of the Congo (“MONUSCO”).¹

2. By an application filed on 11 November 2022, he challenges what he describes as the decision of 14 October 2022 by the Management Evaluation Unit (“MEU”) to not make a determination on the merits of his management evaluation request relating to the claim for compensation for damages in a case of defamation contained in the 8 June 2022 warning letter to him for unacceptable behavior (“warning letter”).²

Facts

3. On 8 June 2022, MONUSCO issued the Applicant with a warning letter for unacceptable behavior.³

4. On 29 August 2022, the Applicant requested management evaluation of MONUSCO’s decision to issue him the warning letter.⁴

5. On 13 October 2022, MONUSCO withdrew the warning letter. On 14 October 2022, the Applicant informed the MEU that MONUSCO had withdrawn the warning letter.⁵

6. Based on the Applicant’s notification, on 14 October 2022, the MEU informed the Applicant that his request for management evaluation had been rendered moot, and, accordingly, closed the request.⁶

7. On 28 October 2022, the Applicant wrote to MEU seeking reasons why his

¹ Application, section I.

² Application, section V.

³ Application, annex 1, p. 2.

⁴ Application, section VI.

⁵ Unnumbered annex to the application (letter from MEU).

⁶ *Ibid.*

request was not reviewed on its merits.⁷

8. Further, on 28 October 2022 and 22 November 2022, MONUSCO wrote to the Applicant requesting him to provide comments, in writing, on the incident that had elicited the warning letter. MONUSCO indicated that the request was in line with staff rule 10.2(c) for a staff member to be provided with the opportunity to comment on the allegations prior to the issuance of a written or oral reprimand.⁸

9. The Applicant provided his comments on 31 October 2022 and 28 November 2022.⁹

10. On 31 October 2022, the MEU replied to the Applicant's inquiry of 28 October 2022, stating that the warning letter he had received was not a reprimand letter, but an opportunity given to him to comment on the issues which had been reported to the Administration against him.¹⁰

11. On 11 November 2022, the Applicant filed this application challenging the MEU's decision to not review his request on its merits.

12. On 30 November 2022, the Respondent filed a motion for summary judgment. By the same motion, the Respondent sought a suspension of the deadline for filing his reply pending the Tribunal's determination of the motion.

13. On 7 December 2022, the Applicant submitted his comments on the Respondent's motion for summary judgment.

⁷ Application, section VII, para. 9.

⁸ Respondent's motion for summary judgment, annex R/1.

⁹ *Ibid.*, annex R/2.

¹⁰ Application, annex 11.

Submissions

Respondent's submissions

14. The Respondent challenges the receivability of the application on three grounds.

- a. the Dispute Tribunal lacks jurisdiction to review a response to a management evaluation request. Relying on *Hammond*¹¹ and *Nwuke*¹², the Respondent asserts that the MEU's response to a request for management evaluation is not an administrative decision under art. 2(1)(a) of the Tribunal's Statute. It produces no direct legal consequences affecting a staff member's terms and conditions of service. Therefore, the Dispute Tribunal is not competent to hear and pass judgment on it.
- b. The application is moot and not receivable *ratione materiae* because MONUSCO withdrew the warning letter on 13 October 2022. The withdrawal of the warning letter resolves the controversy in this case as the Applicant has produced no evidence of harm or any alleged harm that was a result of the warning. Therefore, there is no justiciable matter before the Tribunal.
- c. The Applicant has not exhausted internal remedies. By alleging that the Chief Transport Officer (who issued the warning letter) abused his authority¹³, the Tribunal lacks competence to adjudicate such a claim at first instance. The Applicant must first exhaust the internal procedure under ST/SGB/2019/8 (Addressing discrimination, harassment, including sexual harassment, and abuse of authority). There has been no decision to impose disciplinary measures under staff rule 10.2 for the Tribunal's

¹¹ *Hammond* 2021-UNAT-1143, para. 36.

¹² *Nwuke* 2016-UNAT-697, paras. 20-23.

¹³ Application, section VIII.

adjudication. The Respondent seeks to rely on *Auda*¹⁴ and argue that the Tribunal may only adjudicate an appeal against the outcome of a procedure or corrective measure.

Applicant's submissions

15. The Applicant requests the Tribunal to reject the Respondent's motion for summary judgment. He equally supports his position based on three grounds:

- a. The warning letter violated staff rule 10.2(c). He contends that the warning letter was in fact a reprimand, largely because it was titled "Final Warning Letter". Pursuant to this rule, a staff member is supposed to be provided the opportunity to comment on the facts before the issuance of the written or oral reprimand. In his case, he was requested to provide comments after the warning letter was withdrawn.
- b. Harm suffered due to the warning letter. He suffered public humiliation. Further, he risked losing his job, which supports him to feed and take care of his wife and children. He, thus, requests compensation for such damages.
- c. Regarding the Respondent's contention that the Applicant has not exhausted internal remedies, the Applicant submits that he engaged the Office of the United Nations Ombudsman, the Mission Administration and the Staff Union. He is still available for any discussion with any other relevant office.

Considerations

16. The process which led to the issuance of the warning letter does not seem entirely regular, however, the application is not receivable for two reasons: First, the gist of the application, clearly, is against the warning letter and not against the

¹⁴ *Auda* 2017-UNAT-786, paras. 28-33.

management evaluation in and of its own. The management evaluation request in this case was filed outside the statutory deadlines but above all, was unnecessary. The application against a non-disciplinary measure issued pursuant to staff rule 10.2(b) does not require management evaluation. In such cases, pursuant to staff rule 11.4(b),

[w]here a staff member is not required to request a management evaluation, pursuant to staff rule 11.2 (b), he or she may file an application directly with the United Nations Dispute Tribunal within 90 calendar days from the date on which the staff member received notification of the contested administrative decision.

17. The present application is therefore belated.

18. Second, should the Applicant insist that the application is directed against the management evaluation as such, the application is not receivable for the lack of a reviewable administrative decision. Contrary to the Respondent's overarching averment, the outcome of management evaluation may be challenged at times, that is, where it amends the impugned decision.¹⁵ In the present case, nevertheless, the merits were not entertained at all. Moreover, as noted by the Respondent, the issue has been rendered moot by the withdrawal of the said warning letter, whereupon there is presently no case to answer. It is the Tribunal's understanding that the process is ongoing, and, in the event of an adverse decision, the Applicant will be able to appeal it in accordance with the legal framework.

19. Receivability of the application, in turn, is not affected by not exhausting of any internal remedies. This is because the present case is not about the outcome of proceedings under section 5.6 of ST/SGB/2019/8 which may be a finding of discrimination, harassment or abuse of authority or absence thereof, possibly – instituting corrective measures to restore a healthy workplace. Conversely, no law makes using ST/SGB/2019/8 an obligatory stage in order to aver improper motives of any other

¹⁵ Staff rule 11.4 (a) A staff member may file an application against a contested administrative decision, *whether or not it has been amended by any management evaluation* (emphasis added).

administrative decision, where the focus is on rescission and not on a finding of misconduct. The Respondent was told the same as early as in *Messinger*, which states:

It is clear that the UNDT is not clothed with jurisdiction to investigate harassment complaints under Article 2 of the UNDT Statute. *However, for the purposes of determining if the impugned administrative decisions were improperly motivated, it is within the competence of the UNDT to examine allegations of harassment (emphasis added).*¹⁶

20. The Appeals Tribunal reiterated the same in *Toure*, stating that: “[a]s part of its judicial review, it is necessary to determine whether the decision was vitiated by bias or bad faith, that is, if it was taken for an improper purpose”.¹⁷ The difference in focus of the proceedings is confirmed by *Nwuke, Argyrou, , and Symeonides*¹⁸, in the latter case in particular, para. 33: “In other words, before a staff member may *file an ST/SGB/2008/5 complaint* with the UNDT, he or she must have exhausted the internal remedies set forth in the Secretary-General’s Bulletin... (emphasis added)”. The Tribunal, moreover, takes note of the *Luvai*¹⁹ judgment, where the Appeals Tribunal stated that the Dispute Tribunal lacked jurisdiction to *pronounce* i.e., rule on it in the operative part of the judgment²⁰, on harassment allegations when the applicant failed to file a complaint under ST/SGB/2008/5. This does not mean that the Dispute Tribunal would not be competent to make a finding of an improperly motivated decision for the purpose of rescinding it.

21. In practical terms, indeed, an applicant challenging an administrative decision on the basis of ulterior motive may be less equipped to establish discrimination, harassment etc, to the required standard. On the other hand, though, an applicant is bound to bring his/her action within the statutory deadlines. It may be impossible for him or her to institute ST/SGB/2019/8 proceedings before the deadlines, let alone wait

¹⁶ *Messinger* 2011-UNAT-123, para. 25

¹⁷ *Toure* 2016-UNAT-660, para.30

¹⁸ 2010-UNAT-099, 2019-UNAT-969 and 2019-UNAT-977, respectively.

¹⁹ 2014-UNAT-417.

²⁰ *Luvai*, para. 136 of UNDT/2013/035.

for the outcome. In order to meet the deadlines, such applicant must undertake to discharge the burden of proof himself or herself.

22. For all the aforesaid reasons, it should be clear for the Respondent that ST/SGB/2019/8 proceedings are not prerequisite for challenging decisions taken outside of the purview of ST/SGB/2019/8.

23. In any event, the application is not receivable for reasons stated in paras. 16-18 above.

JUDGMENT

24. The application is dismissed.



Judge Agnieszka Klonowiecka-Milart

Dated this 25th day of January 2023

Entered in the Register on this 25th day of January 2023



Abena Kwakye-Berko, Registrar, Nairobi