



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2022/001
Judgment No.: UNDT/2023/061
Date: 22 June 2023
Original: English

Before: Judge Joelle Adda

Registry: New York

Registrar: Isaac Endeley

PUMPYANSKAYA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON

RECEIVABILITY

Counsel for Applicant:

Robbie Leighton, OSLA

Counsel for Respondent:

Lucienne Pierre, AS/ALD/OHR, UN Secretariat

Introduction

1. By application of 5 January 2022, the Applicant contests the “[d]ecision to close complaints of harassment and abuse of authority without proper investigation, [and a] possible other decision to close a complaint following investigation”.
2. On 17 April 2023, the Respondent filed a motion to “have receivability determined as a preliminary matter” in light of the Appeals Tribunal’s recent judgment in *O’Brien* 2023-UNAT-1313 and further stated his submissions regarding the alleged non-receivability of the application.
3. By Order No. 034 (NY/2023) dated 26 April 2023, the Tribunal ordered the Applicant to file his comments, if any, to the Respondent’s motion on receivability.
4. On 17 May 2023, the Applicant filed his submissions as per Order No. 034 (NY/2023).

Consideration

Receivability as a preliminary matter

5. The Appeals Tribunal has held that the Dispute Tribunal may consider the receivability of an application as a preliminary matter before reviewing the merits of the case (see, for instance, *Pellet* 2010-UNAT-073). Based on the 17 April 2023 motion of the Respondent on non-receivability, and for the fair and expeditious disposal of the case and to do justice to the parties in accordance with art. 19 of its Rules of Procedure, the Tribunal will therefore do so.

The submissions on receivability of the parties

6. The Respondent’s contentions may be summarised as follows:
 - a. The application is “not receivable *ratione materiae* because the contested decision is not a reviewable administrative decision”. In *O’Brien*, the Appeals Tribunal held that “a decision not to investigate allegations of misconduct is not a reviewable administrative decision, because it does not

produce direct legal consequences on a staff member's rights under a contract of employment". This is the case, since it "does not have direct effect on a staff member, does not have external legal effect, and does not directly or adversely impact a staff member's contractual employment rights". The Appeals Tribunal's holding in *O'Brien* is "directly applicable to this case". The Applicant contests the decision of the Office of Internal Oversight Services ("OIOS") to "not investigate her allegations of misconduct" against the Under-Secretary-General ("the USG") of the Department of Global Communications ("DGC"), the Executive Officer ("the EO") of DGC, and an Administrative Assistant in DGC, who is also referred to as the Personal Assistant ("the PA"). In the present case, as in *O'Brien*, no evidence has been submitted that "the contested decisions had any direct effect on the Applicant, had any external legal effect, or directly or adversely impacted the Applicant's contractual employment rights". The applicability of *O'Brien* is "highlighted by the similarities between the two matters". In *O'Brien*, the applicant complained to "the Office for Audit and Investigations (OAI) that he had been the subject of malicious reporting and demanded an independent investigation", and in the present case, the Applicant "complained to OIOS ([the Secretariat's] equivalent of OAI) that she had been the subject of malicious reporting, and demanded an independent investigation";

b. A "second parallel between the two matters is that the *O'Brien* applicant claimed that anonymous complaints were made against him for improper purposes, including as retaliation for him having raised issues of corruption". The Applicant here also "claims anonymous complaints were made against her for improper purposes, such as a pretext for separating her from service";

c. A "third parallel is that both applicants alleged procedural irregularities in the review of their complaints". The applicant in *O'Brien* alleged that "an OAI investigation into his conduct was improperly motivated, had not been carried out according to OAI investigation

guidelines, and had not been carried out under the presumption of innocence”. In the present case, the Applicant makes “similar allegations about the Fact-Finding Panel (FFP) investigation into her conduct, and OIOS’s preliminary assessment of her complaints”. Because of these “alleged procedural irregularities, one of the two remedies the Applicant seeks in this case is that the three complaints she made to OIOS ‘be referred to an independent investigative body for investigation’”. The findings of “the Appeals Tribunal are binding for the Dispute Tribunal and they are applicable in similar cases”;

d. Just as the Appeals Tribunal found in *O’Brien* that “staff members do not have any right under the governing legal framework to an independent review of an investigation by OAI, which is the independent investigative branch of [the United Nations Development Programme (“UNDP”)], providing internal, objective oversight and investigation services and which has operational independence in terms of UNDP Financial Regulation 4.01 and the OAI Charter”, in the present case, the Applicant does “not have any right to compel OIOS, an operationally independent investigative entity, to conduct an independent review of an investigation by a FFP”;

e. Without “any prejudice to the Applicant’s rights to pursue her claims in Case No. UNDT/NY/2022/003, the result in this case should be the same as in *O’Brien*: a finding that the Application is not receivable, given that the contested decisions had no direct effect on the Applicant, had no external legal effect, and have not directly or adversely impacted the Applicant’s contractual employment rights”.

7. The Applicant, in essence, contends that the Respondent “misstates” the Appeals Tribunal’s “finding in *O’Brien*”, which concerns a situation different from the one in the present case.

Does the O'Brien judgment have an impact on the receivability of the present case?

8. In the present case, pursuant to the application, the Applicant is, principally, contesting the “[d]ecision to close complaints of harassment and abuse of authority without proper investigation”. The Applicant had, accordingly, filed complaints of misconduct against the USG, the EO and the PA, which OIOS subsequently all rejected. The present case therefore, mainly, concerns OIOS’s rejection of the Applicant’s complaints of misconduct against three other staff members.

9. The context of the case in *O'Brien* is not similar. Essentially, in *O'Brien*, the applicant was the subject of an investigation, whereas in the present case, the Applicant was the complainant. Accordingly, In *O'Brien*, the applicant opposed a disciplinary investigation launched against himself based on a misconduct complaint made by others, and he then contested a decision to reject his request for an independent review of the investigation. The Appeals Tribunal, however, dismissed the applicant’s challenge because the decision-maker eventually held in his favour as, contrary to the preliminary recommendation of the investigative entity, it was decided not to impose any sanction against him. Based thereon, the Appeals Tribunal therefore found that the decision not to launch an independent review “did not produce direct legal consequences affecting [his] rights under the contract of employment” and that any future impact of the challenged decision were “hypothetical and not ripe for determination” (see paras. 32 and 33, respectively).

10. Consequently, as the situations of the present case and *O'Brien* are not comparable, *O'Brien* has no precedential effect in the present case. The additional “parallels” referred to by the Respondent are therefore also irrelevant. The Tribunal further observes that—without making any additional findings in this regard—the contested decision in the present case is one that may, possibly, be reviewed by the Dispute Tribunal under the consistent jurisprudence of the Appeals Tribunal (see, for instance, *Nwuke* 2010-UNAT-099, *Nadeau* 2017-UNAT-733, *Okwir* 2022-UNAT-1232, and *Yavuz* 2022-UNAT-1291).

Conclusion

11. The application is receivable in light of the Appeals Tribunal's judgment in *O'Brien*.

(Signed)

Judge Joelle Adda

Dated this 22nd day of June 2023

Entered in the Register on this 22nd day of June 2023

(Signed)

Isaac Endeley, Registrar, New York