



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NY/2023/019

Judgment No.: UNDT/2024/025

Date: 29 April 2024

Original: English

Before: Judge Margaret Tibulya

Registry: New York

Registrar: Isaac Endeley

O'MULLANE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

ON RECEIVABILITY

Counsel for Applicant:

Cristian Gimenez Corte

Counsel for Respondent:

Lucienne Pierre, AS/ALD/OHR, UN Secretariat

Introduction

1. The Applicant is a Director, at the D-2 level, in the Office of Information and Communications Technology (“OICT”) in the United Nations Secretariat. On 9 July 2023, he filed an application contesting the 10 January 2023 “decisions of the Office of Internal Oversight Services (“OIOS”) to decline to open an investigation into [his] report of prohibited conduct against the United Nations (UN) Controller [...] for possible noncompliance of the UN Controller with UN financial rules and regulations”.

2. On 18 July 2023, the Respondent filed a motion to have the receivability of the application determined as a preliminary matter. The Respondent also requested the Tribunal to suspend the deadline for the filing of his reply pending the Tribunal’s determination of the motion.

3. This case was assigned to the undersigned Judge on 1 April 2024.

4. On 3 April 2024, the Tribunal conducted a case management discussion (“CMD”) with the parties and their legal representatives.

5. By Order No. 041 (NY/2024) of 4 April 2024, the Tribunal granted the Respondent’s motion on determining the receivability of the application as a preliminary matter.

6. For the reasons set out below, the application is dismissed as not receivable *ratione materiae*.

The Parties’ submissions

7. The Applicant’s contentions may be summarized as follows:

a. With the implementation of the Secretary-General’s management reform effective on 1 January 2019, two major offices were “merged into one ICT organization to serve the broader UN Secretariat”. Budget and financial management within “the new enlarged OICT” were centralized under the

supervision of the Chief Information Technology Officer (“CITO”) and the Applicant “ceased having visibility, oversight and responsibility to manage the [Office’s] budgetary and financial issues”.

b. Prior to the 2019 reform, there were two funding sources providing ICT support for United Nations peacekeeping operations and special political missions. In the months following the reform, “there were rumors of a large but undefined deficit in OICT’s finances” and estimates ranged from USD8 million to USD12 million annually. To strengthen financial management capacity within OICT, “a senior staff member from the Controller’s office was assigned” to OICT in 2021 and produced reports that “gave the Controller visibility into the OICT budget, funding sources and financial management”.

c. A new CITO was appointed in August 2021. During a virtual meeting with him on 14 April 2022, the Controller stated that there was a “potential gap in revenue, so the overall gaps are going to be in the region of 7 to 8 million [dollars] minimum” and a senior staff member from the Controller’s office added that in 2023 there would be a USD15 million deficit.

d. An analysis of OICT’s budgetary and financial situation conducted in May 2023 showed that a “lack of alignment between mandated activities and the associated budgeted resource requirements” was “at the heart of the funding mismanagement at OICT”.

e. By June 2023, the projected deficit at OICT was USD10,098,330, but the Controller “refuses to assume responsibility” and instead seems to “point publicly to someone else as being untrustworthy and blocking his access to the picture of OICT’s finances”. Specifically, the Controller named the Applicant “as having resisted all efforts by his office to get to the bottom of the OICT’s financial picture”.

f. Due to “the failings of the OICT budget and funding model” after the merger, the peacekeeping funding sources were no longer being tracked or

matched to expenditures, and this “led to peacekeeping funding sources being repurposed to cross subsidize non peacekeeping activities”. Although “funds were surplus” in the appropriate regular funding source, the Controller did not approve the use of non-peacekeeping funds, thus denying “an opportunity to rectify a clear-cut case of cross funding”. The surplus funds were subsequently “surrendered” at the end of the regular budget period, thereby “unnecessarily exacerbating the OICT deficit”. Since 1 January 2019, funds collected by OICT from United Nations peacekeeping missions are “being used to cross subsidize services across the wider UN Secretariat”.

g. The Controller has expressly “confessed” to diverting funds. The Applicant reported this “prohibited conduct” but “OIOS refused to open an investigation”.

8. The Respondent’s submissions may be summarized as follows:

a. Under the jurisprudence of the Appeals Tribunal, a contested decision that does not produce direct legal consequences on a staff member’s rights under a contract of employment is not a reviewable administrative decision. “This is because 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 rights”.

b. Although the Applicant characterizes the contested decision as OIOS’s decision “to decline to open an investigation”, such characterization is “materially inaccurate”. In reality, the OIOS correspondence of 10 January 2023 advises the Applicant to “please be assured that OIOS has taken appropriate action in respect of the concerns raised”. This statement is not a decision to decline to investigate and does not produce any direct effect on the Applicant’s terms of appointment or contract of employment.

c. To the extent that the Applicant filed his application in an effort to ascertain what “appropriate action” OIOS has taken, the application is not

receivable because, under the applicable legal framework, the Applicant is not entitled to information about an investigation or action taken.

d. The Organization, and not the Applicant, is the aggrieved party of any alleged misconduct with respect to any staff member's possible noncompliance with the United Nations financial rules and regulations. As such, "the Applicant lacks sufficient direct and substantial interest in the decision necessary to confer standing".

Considerations

9. The Tribunal recalls that under the jurisprudence of the Appeals Tribunal, the Dispute Tribunal is required to satisfy itself that an application is receivable under art. 8 of its Statute (see, for instance, *O'Neill* 2011-UNAT-182, as affirmed in *Christensen* 2013-UNAT-335, and *Barud* 2020-UNAT-998).

10. A staff member cannot compel the Organization to undertake an investigation unless such right is granted by the Staff Regulations and Rules of the United Nations (see the Appeals Tribunal in *Nwuke* 2010-UNAT-099, paras. 3 and 30). The receivability of an application contesting a refusal to initiate an investigation would therefore "depend on the following question: Does the contested administrative decision affect the staff member's rights directly"? (See *Nwuke*, para. 28, and similarly, *Ross* 2023-UNAT-1336, para. 24).

11. The main application concerns the alleged refusal by the Office of Internal Oversight Services ("OIOS") to open an investigation into the Applicant's report of prohibited conduct against the United Nations Controller, for possible noncompliance of the United Nations Controller with United Nations financial rules and regulations. The Applicant has not cited any regulations or rules, and the Tribunal finds none, which afford him a right to compel the Administration to conduct an investigation.

12. Moreover, the Tribunal agrees with the Respondent that the Organization, not the Applicant, is the aggrieved party in any alleged misconduct with respect to any staff

member's possible noncompliance with United Nations financial rules and regulations. This case is distinguishable from *Ross* 2023-UNAT-1336 on facts, since in *Ross*, the contested refusal to investigate directly concerned the rights of the applicant (see para. 24 of the Appeals Tribunal's judgment).

13. Also, while the Applicant has an ongoing obligation as a staff member to report any suspected misconduct in this regard, he does not have a right to any information about an investigation or action taken in relation to it. As such, the Applicant lacks sufficient direct and substantial interest in the decision necessary to confer standing.

14. The Tribunal further finds that the 10 January 2023 statement by OIOS to the effect that it "has taken appropriate action in respect of the concerns raised" by the Applicant does not represent a decision to decline to investigate the Applicant's report, since an "appropriate action" could reasonably include the conduct of an investigation. There is, therefore, no basis for the assertion that OIOS declined to conduct an investigation into the Applicant's report.

15. Additionally, the Applicant's argument that his right to know if OIOS would investigate or not was breached lacks merit. To begin with, the Tribunal's conclusion that "appropriate action" could reasonably include the conduct of an investigation, renders the Applicant's complaint contradictory. Besides, it is clear that this OIOS response does not produce direct legal consequences on the Applicant's rights and does not produce any direct effect on the Applicant's terms of appointment or contract of employment.

16. More importantly, the Applicant's claim to a right to such information is not legally founded. Nowhere under Administrative Instruction ST/AI/2017/1 (Unsatisfactory conduct, investigations and the disciplinary process) or other administrative issuances is such a right afforded to the Applicant. In fact, sec. 4.7 of ST/AI/2017/1 provides that "[u]nless expressly provided for in the present instruction or other administrative issuances, staff members and third parties are not entitled to information about an investigation or action taken" regarding a complaint.

17. For the foregoing reasons, the Tribunal finds that the application is not receivable.

18. Having found that the application is not receivable, the Tribunal also determines that the Applicant's motions for interim measures; for the joinder of this case and Case No. UNDT/NY/2023/020; and for a hearing stand to be rejected.

Conclusion

19. The application is dismissed as not receivable.

(Signed)

Judge Margaret Tibulya

Dated this 29th day of April 2024

Entered in the Register on this 29th day of April 2024

(Signed)

Isaac Endeley, Registrar, New York