



Before: Judge Vinod Boolell

Registry: Nairobi

Registrar: Jean-Pelé Fomété

NOGUEIRA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER ON RECEIVABILITY

Counsel for applicant:
Self-represented

Counsel for respondent:
Susan Maddox, ALS/OHRM, UN Secretariat

Introduction

1. By an application dated 11 November 2009, the Applicant, a former staff member of the United Nations Environment Programme (UNEP) is contesting the decision of the Assistant Secretary-General for Human Resources Management (ASG/OHRM), dated 4 June 2009, that “*Mr. Djoghla¹ did not act in a manner consistent with the standards of conduct expected of senior officials of the Organization*” but fails to address the harassment suffered by the Applicant and to provide any remedy for the harassment.

2. By a reply dated 18 December 2009, the Respondent requested that the application be dismissed as a review of the events that took place in 2006 is time-barred and the 4 June 2009 letter from the ASG/OHRM is not an appealable administrative decision.

3. On 20 May 2010, the Applicant submitted comments on the Respondent’s reply. He submitted that his application is receivable because while his application refers to events that took place between 2005 and 2007, he is contesting the administrative decision contained in a letter dated 4 June 2009 from the ASG/OHRM.

4. On 1 June 2010, the Respondent submitted a motion for a preliminary determination on the issue of the application’s receivability.

Considerations

5. The issue for determination is whether the Applicant’s application, dated 11 November 2009, is receivable. To reach a determination on receivability, it will be necessary for the Tribunal to look at the following core issues:

¹ Assistant Secretary-General, Executive Secretary of the Convention on Biological Diversity, United Nations Environment Programme.

Is the 4 June 2009 decision, upon which the current application is based, an appealable administrative decision under Article 2(1)(a) of the Statute of the United Nations Dispute Tribunal.

6. The Respondent submits that the decision of the ASG/OHRM to close the case against Mr. Ahmed Djoghlaif, Executive Secretary, Convention on Biological Diversity, with administrative action, which was notified to the Applicant on 4 June 2009, was not an administrative decision that affected the terms of his appointment.

7. The Applicant submits that the ASG/OHRM's 4 June 2009 letter is a clear administrative decision as its aim was to bring closure to the case. Further, this decision that was taken by the Administration, was unilateral and of individual application and it carries direct legal consequences. Additionally, the decision to close the case without addressing his allegations and complaints impacts on his rights and legitimate interests and violates his "*contract of employment or terms of appointment*".

8. Article 2(1)(a) of the Statute of the United Nations Dispute Tribunal (UNDT Statute) provides that the Tribunal shall be competent to hear and pass judgment on an application filed by an individual:

To appeal an administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment. The terms "contract" and "terms of appointment" include all pertinent regulations and rules and all relevant administrative issuances in force at the time of alleged non-compliance [...]

9. In *Teferra*², the Tribunal stated that, "[g]iven the nature of the decisions taken by the administration, there cannot be a precise and limited definition of such a decision. What is or is not an administrative decision must be decided on a case by

² UNDT Judgment No. 2009/090 (2009).

case basis and taking into account the specific context of the surrounding circumstances when such decisions were taken". This is applicable in the current case.

10. Briefly, the relevant facts are that on 9 June 2006, the Applicant lodged a formal complaint of harassment, discrimination, constructive dismissal and retaliation against Mr. Djoghlafl with the relevant UN officials³, which was not acted on by the Administration. On 14 May 2007, he lodged a second complaint, which was addressed to the Secretary-General. On 18 July 2007, an investigation panel (IP) was established to conduct a preliminary investigation into: (i) allegations made against Mr. Djoghlafl by the Applicant and other staff members; and (ii) allegations brought by Mr. Djoghlafl against the Applicant et al. The IP was also required to provide a factual basis for a decision as to whether or not disciplinary action should be pursued against Mr. Djoghlafl or the staff members.

11. The IP's final report, which was submitted on 22 October 2007, concluded that most of the Applicant's allegations against Mr. Djoghlafl, including harassment, discrimination and character assassination, were established. Further, the IP concluded that the allegations of Mr. Djoghlafl against the Applicant were not sustained.

12. By letter dated 4 June 2009, the ASG/OHRM informed the Applicant that the IP report had been referred to her pursuant to ST/AI/371 for appropriate action. She further informed him that:

[...] The record indicates that Mr. Djoghlafl did not act in a manner consistent with the standards of conduct expected of senior officials of the Organization and, accordingly, administrative action has been taken against him.

³ The memorandum was addressed to: the Deputy Executive Director, UNEP; the ASG/OHRM; and the Director of the Investigations Division of the Office of Internal Oversight Services. It was also copied to the Under-Secretary-General for Legal Affairs, the Chief of Staff in the Office of the Secretary-General, the UN Ombudsman and the Panel of Counsel.

Thank you for your assistance and cooperation in this matter, and in particular, for bringing the matter to the attention of the Administration and diligently pursuing it.

13. Paragraphs 2.1 and 2.2 of ST/SGB/2008/5 on *Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority* provide that:

2.1 In accordance with the provisions of Article 101, paragraph 3, of the Charter of the United Nations, and the core values set out in staff regulation 1.2(a) and staff rules 101.2(d), 201.2(d) and 301.2(d), every staff member has the right to be treated with dignity and respect, and to work in an environment free from discrimination, harassment and abuse. Consequently, and form of discrimination, harassment, including sexual harassment, and abuse of authority is prohibited.

2.2 The Organization has the duty to take all appropriate measures towards ensuring a harmonious work environment, and to protect its staff from exposure to any form of prohibited conduct, through preventive measures and the provision of effective remedies when prevention has failed. (emphasis added)

14. The contents of ST/SGB/2008/5 form part of the conditions of the contract of a staff member with the Organization. A staff member therefore has a right to be protected from harassment in his/her workplace. If the Organization just brushes aside a complaint of harassment and does so without giving reasons, a staff member is justifiably entitled to feel and conclude that the Organization is breaching one of the essential component of the contract binding him/her to the Organization. This would, no doubt, impact on the work and therefore on the terms of appointment of the staff member.

15. Therefore, the Tribunal considers that the Applicant has correctly argued that the 4 June 2009 letter from the ASG/OHRM impacts on his rights and legitimate interests in that it closed the case without acknowledging the findings of the IP in relation to the Applicant or addressing the issue of a remedy for the harassment suffered by him. In other words, the 4 June 2009 letter has direct legal consequences for the Applicant and is therefore an administrative decision under Article 2(1)(a) of the UNDT Statute.

Is the application time-barred?

16. The Respondent submits that a review of the events that took place in 2006 is time-barred as the Applicant did not submit a request for review within the two-month time period prescribed by former staff rule 111.2(a) and he does not refer to any exceptional circumstances that prevented him from filing a timely request for review.

17. The Respondent further submits that the Applicant cannot seek a waiver of the time limit in this case as it was established in UNDT Judgment No. 2009/51⁴ that the Tribunal does not have the power to waive the time limits for requests for administrative review.

18. The Applicant submits that his case is a continuum between 2006 and the present, which has never been interrupted and that he was only able to request a management evaluation when the arduous administrative procedure was finally exhausted by the decision to close the case without addressing the damages caused to him. Thus, he complied with the provisional staff rule 11.2(c) when he submitted a request for management evaluation dated 1 July 2009, which the Management Evaluation Unit (MEU) received and duly evaluated in a letter dated 14 August 2009.

⁴ Costa v Secretary-General.

19. The Applicant further submits that the UNDT Statute does not forbid the consideration of events that occurred in 2006, provided that the legal deadlines and procedures for the submission of the Application have been respected. As the case was properly started by a formal complaint in 2006, followed by a formal investigation in 2007, and a formal decision in 2009, it is legitimate that a legal action challenging such decision be submitted to the Tribunal in 2009.

20. The Tribunal is of the view that the Applicant is not contesting a decision or decisions that were made in 2006. He is contesting a decision that was made in 2009 but stemmed from matters that started in 2006 and culminated in 2009. Based on the circumstances of this case, the Applicant correctly depicts the situation as an uninterrupted continuum between 2006 and the present.

21. In *Schook*⁵, the United Nations Appeals Tribunal (the Appeals Tribunal) overturned a UNDT judgment rejecting an application on the grounds that the staff member had failed to comply with the time limits applicable to the former system of justice. The Appeals Tribunal noted that the UNDT Statute provides that time limits for contesting decisions run “from the date the staff member received notification of the decision in writing.”

22. Applying the decision in *Schook* to the present case, it is unreasonable for the Respondent to argue that the Applicant should have submitted a request for review in 2006 within the two-month time period prescribed by former staff rule 111.2(a) when he received written notification on the outcome of his 2006 complaint on 4 June 2009 and a copy of the IP report in September 2009. The Applicant should not be punished for the Respondent’s foot-dragging and lethargy in dealing with the allegations that were first reported in 2006.

23. Further, pursuant to Article 8(1)(d)(1)(a) of the UNDT Statute, in cases where a management evaluation of the contested decision is required, an application shall be

⁵ 2010 UNAT 013.

receivable if the application is filed within 90 calendar days of the applicant's receipt of the response by management to his or her submission.

24. The Applicant requested management evaluation of the 29 June 2009 decision on 1 July 2009. The Management Evaluation Unit responded to his request on 14 August 2009. The Applicant filed the current application with the UNDT Registry in New York on 11 November 2009 and it was subsequently transferred to the UNDT Registry in Nairobi by an order dated 18 November 2009. Based on the foregoing, the Applicant complied with the provisions of Article 8(1)(d)(1)(a).

25. In light of the discussion above, the Respondent's contention that a review of these events that took place in 2006 is time-barred is not sustainable. Thus, a discussion of the applicability and/or relevance of *Costa v. Secretary-General* is not necessary.

Conclusions

26. In light of the considerations above, the Tribunal concludes that the current application is receivable.

27. The Respondent's reply of 18 December 2009 did not address the merits of the case. In paragraph 24 of the reply, the Respondent wrote:

If the Tribunal finds any matter arising from the Application to be receivable by the Tribunal, the Respondent respectfully reserves the right to make further submissions on these issues.

28. Accordingly, for the fair and expeditious disposal of this case, the Respondent **is hereby ordered** to make further submissions on the substantive issues raised in the application on or before Tuesday, 27 July 2010.

29. Upon the Respondent's compliance with the order given above, the Tribunal will provide additional directions in relation to the conduct of this case.

(Signed)

Judge Vinod Boolell

Dated this 20th day of July 2010

Entered in the Register on this 20th day of July 2010

(Signed)

Jean-Pelé Fomété, Registrar, UNDT, Nairobi