



UNITED NATIONS DISPUTE TRIBUNAL

Case No.: UNDT/NBI/2019/140
Order No.: 038 (NBI/2020)
Date: 13 February 2020
Original: English

Before: Judge Agnieszka Klonowiecka-Milart

Registry: Nairobi

Registrar: Abena Kwakye-Berko

PIERRE

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

**ORDER ON CASE MANAGEMENT
AND HEARING NOTICE**

Counsel for the Applicant:

Sètondji Roland Adjovi

Counsel for the Respondent:

Nusrat Chagtai, AAS/ALD/OHR

Introduction

1. The Applicant is contesting the one-month extension of his fixed-term contract until 31 July 2019. He maintains that the decision was an element of ongoing harassment to which he has been subjected for two years. The Applicant seeks compensation for the harm suffered; as such, he maintains that the dispute remains active notwithstanding that he has now been granted a longer appointment.

2. After several exchanges regarding receivability, formulation of the claim and the scope of relevant facts, the parties conceded that a hearing would assist in resolving the dispute. Given, however, a degree of apparent misconception, on both sides, as to what is the subject of proceedings, the Tribunal feels that judicial economy requires it to offer the following clarification on the issues concerned.

3. Regarding the Respondent's repeated argument about receivability, the Tribunal points out that the subject of the proceedings is no longer the initial claim for granting the Applicant a longer appointment. This part of the claim indeed appears to have been rendered moot. The Applicant, however, since the beginning has been claiming compensation for harm caused by what he alleges to have been an improperly motivated decision of granting him only a short-term appointment. He claims having suffered both moral and financial loss from it and has proposed evidence on the same. On the issue of a dispute remaining live in a situation where there remain unresolved elements of the claim, the Respondent is directed to consult the Appeals Tribunal jurisprudence, such as *Kallon 2017-UNAT-742* and subsequent ones.

4. Regarding the Respondent's argument (in response to Order No. 14 (NBI/2020)) about a lack of Tribunal's jurisdiction over allegations of harassment, as this would require the Applicant to have exhausted the internal remedies set forth in ST/SGB/2008/5, the Tribunal feels compelled to dwell a bit on the Respondent's arguments in order to dispel a potential confusion.

5. At the outset, the Tribunal recalls that art. 2.1(a) of the UNDT Statute provides that the Tribunal shall be competent to hear and pass judgment on an application [...]

To appeal an administrative decision that is alleged to be in noncompliance 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 noncompliance [...].

6. The competence of the Tribunal is determined by the UNDT Statute alone and this competence does not fall to be modified by administrative issuances; likewise, the latter must not be attributed legal effect inconsistent with the Statute. Several consequences stem from this for the relation of UNDT proceedings and proceedings under ST/SGB/2008/5, which would have applied to the present case. The considerations here are relevant also for proceedings under section 5.6 of ST/SGB/2019/8 which now superseded ST/SGB/2008/5.

7. First, in the aspect of subject matter jurisdiction, as long as the application is against a “decision that is alleged to be in noncompliance with the terms of appointment or the contract of employment”, the UNDT Statute does not exclude from the jurisdiction of the Tribunal any decision based on its particular content. Specifically, if an administrative decision related to terms of appointment or the contract of employment constituted in itself an act of harassment, discrimination or abuse of authority, such decision would not be removed from the UNDT competence solely because it bears characteristics of harassment, discrimination or abuse of authority. Furthermore, given that every United Nations staff member has the right to work in an environment free from discrimination, harassment and abuse (ST/SGB/2008/5, section 2.1), a decision of such an abusive effect could readily be challenged as contradicting the terms of appointment or the contract of employment. Therefore, to the extent the Respondent suggests that the UNDT would generally be not competent to deal with complaints of harassment and discrimination, it is inaccurate.

8. Second, art. 2 of the UNDT Statute determines expressly and exhaustively the impact of administrative proceedings on matters falling under UNDT jurisdiction. The

UNDT Statute provides that the impugned decision must be submitted for management evaluation, where required. The UNDT Statute does not, however, require “exhausting internal remedies of ST/SGB/2008/5”.

9. Furthermore, analysis of ST/SGB/2008/5 demonstrates that UNDT proceedings and administrative proceedings under ST/SGB/2008/5 have different functions and are largely independent from each other. Proceedings under ST/SGB/2008/5 serve the purpose of establishing whether there is basis for instituting corrective measures. Harassment, discrimination or abuse of authority are committed not only by discrete administrative decisions but also by other actions, often forming a pattern of behaviour. The mental state of the alleged perpetrator will usually be placed in issue and will have to be proved on the basis of circumstantial evidence and inference drawn from that evidence. In any event, such allegations will invariably give rise to difficult and complex factual inquiries.

10. The proceedings before UNDT are employment-focused, designed to be quick and document-based and use a different distribution of proof, in that an applicant who alleges that a decision constituted harassment, discrimination and abuse of authority carries a burden of proving it (see e.g., *Liu* 2016-UNAT-659; *Assale* 2015-UNAT-534; *Azzouni* 2010-UNAT-081). As such, the UNDT is indeed not equipped to conduct investigations, in the sense of ST/SGB/2008/5, into allegations of harassment, discrimination and abuse of authority, just as it has no competence to pronounce on the corrective, preventive, or monitoring measures foreseen in ST/SGB/2008/5. However, as confirmed by the Appeals Tribunal, “[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” (*Toure* 2016-UNAT-660, para.30). Compared with proceedings under ST/SGB/2008/5 an individual applicant before the UNDT may be less equipped to establish facts of harassment to the required standard; as noted in *He* 2016-UNAT-686, “[s]uch a challenge invariably will give rise to difficult factual disputes.” On the other hand, though, an applicant is bound to bring his/her action within the statutory deadlines.

11. All considered, for the purpose of assessing the validity of a decision concerning the terms of appointment or the contract of employment, the Tribunal is competent to independently establish all facts relevant for the proceedings before it, without being formally limited or bound by either the pendency or the outcome of proceedings under ST/SGB/2008/5.

12. The same is expressed by UNAT in *Messinger* 2011-UNAT-123, para. 25, on which the Respondent relies, and which, when cited faithfully, 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 purpose 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).

13. The holding in *Messinger* confirms that an applicant who wishes to appeal a decision concerning the terms of his/her appointment or the contract of employment is not required to exhaust any measures under ST/SGB/2008/5. Conversely, an aggrieved individual who is pursuing corrective measures under section 5 of ST/SGB/2008/5, as well as the alleged offender, may appeal the outcome of the procedure on corrective measures under section 5.20 to UNDT. The latter, however, is a remedy particular to the avenue of proceedings pursuant to section 5 of ST/SGB/2008/5 and decisions issued thereunder. The same is confirmed by jurisprudence invoked by the Respondent: *Nwuke* 2010-UNAT-099, *Argyrou*, 2019-UNAT-969 and *Symeonides* 2019-UNAT-977 (see 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 *Luvai* 2014-UNAT-417, where the Appeals Tribunal stated that the Dispute Tribunal lacked jurisdiction to *pronounce* on harassment allegations when the applicant failed to file a complaint under ST/SGB/2008/5 (see para. 136 of UNDT/2013/035), whereas otherwise found allegations of harassment insufficiently substantiated. This does not mean that the Dispute Tribunal would not

have been competent to make a finding of improperly motivated decision for the purpose of rescinding it.

14. In conclusion, no law renders ST/SGB/2008/5 proceedings an obligatory stage for every application under art. 2.1(a) of the UNDT Statute which would allege that the impugned decision constituted act of harassment, discrimination or abuse of authority.

15. Moreover, the application in this case does not concern “an ST/SGB/2008/5 complaint”. Allegations of harassment here are contextual, to show abusive purpose of the impugned decision.

16. Regarding the Applicant’s persistent reference to the contested decisions, in plural, the Applicant is reminded of Order No. 202 (NBI/2019). The Tribunal had noted there that, to the extent the Applicant’s grievance appeared directed against an implied decision to refuse him a one-year appointment (as inferred from a series of short-term ones), the formulation of the present application did not allow an interpretation to this effect without transgressing the identity of the contested decision. The Tribunal’s jurisdiction is strictly limited to the decision impugned in the application, i.e. extension of appointment from 1 to 31 July 2019, whereas the subsequent decisions are outside the Tribunal’s jurisdiction. Therefore, in relation to the impugned decision only is the Applicant expected, and allowed, to demonstrate that the decision was (a) illegal, including whether it was taken for improper purpose; and (b) produced lasting adverse consequences.

17. The Tribunal expects the parties, both of whom are represented by counsel, to refocus their arguments accordingly on the question of legality of the impugned decision and its causality with ailments alleged by the Applicant.

ORDER

18. The hearing in the matter of *Pierre v. The Secretary-General of the United Nations* shall be held from **25-26 March 2020**, commencing each day at **14.30 p.m.** Nairobi time (GMT+3) in the United Nations Dispute Tribunal's (UNDT) Courtroom.

19. It is the responsibility of the parties to ensure the availability of their witnesses for the hearing.

20. **On or before 18 March 2020**, the parties shall file with the Registry an agreed hearing schedule and agreed and paginated bundle of the documents which they intend to rely upon at the hearing. The bundle shall contain an index of the documents contained therein. In the event that either party intends to refer their witnesses to any document in the bundle, said document should be provided to the witness in advance.

21. In accordance with art. 16.4 of the UNDT Rules of Procedure, the parties or their duly designated representatives must be present at the hearing either in person or, where unavailable or where directed by the Tribunal, by electronic means. If any of the parties or their witnesses intend to appear by electronic means, they shall provide the Registry with all relevant contact information before the hearing date.

22. The parties and their witnesses are reminded that recording of courtroom proceedings is not permitted.

(Signed)

Judge Agnieszka Klonowiecka-Milart
Dated this 13th day of February 2020

Entered in the Register on this 13th day of February 2020

(Signed)

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