Before: Judge Sean Wallace

Registry: Nairobi

Registrar: René M. Vargas M., Officer-in-Charge

FULTANG

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER ON ADMISSIBILITY OF EVIDENCE AND CASE MANAGEMENT

Counsel for the Applicant:
Sètondji Roland Adjovi, Etudes Vihodé

Counsel for the Respondent:
Jacob van de Velden, DAS/ALD/OHR, UN Secretariat
Andrea Ernst, DAS/ALD/OHR, UN Secretariat

Introduction

1. At the case management discussion ("CMD") held on 9 January 2024, the Applicant requested the Tribunal to issue a preliminary ruling on the admissibility of receipts produced in the course of discussions before the Management Evaluation Unit ("MEU").

2. The Respondent agreed to the issuance of the preliminary ruling.

3. The parties further agreed that once the Tribunal issues its preliminary ruling, the parties will be convened for another CMD to proceed and identify the pending disputed and undisputed facts in the case.

Consideration

4. The Applicant's contention is that the investigation report of the Office of Internal Oversight Services ("OIOS") was based on confidential documents and privileged communications between him and the MEU referred to during the informal resolution process of Case No. UNDT/NBI/2020/076 (Fultang), which were not supposed to be used as evidence against him in the OIOS investigation procedure.

5. The Applicant previously raised the issue before both the Dispute Tribunal and the Appeals Tribunal. In *Fultang* UNDT/2022/102, para. 26, the Dispute Tribunal found that:

> the use in trial of the investigation report is not related at all to the documents subjected to the confidentiality agreement between the parties, but is an autonomous document, which can be lawfully used in court.

6. Further, in *Fultang*, para. 27, the Dispute Tribunal held that:

> [t]he Report – which finds that the Applicant knowingly submitted fake receipts and false information to the MEU in case MEU/159/20/R, in furtherance of a claim for financial reimbursement for costs the staff member did not incur - does not refer to the communications between the Applicant and his counsel (which are privileged) nor to exchanges during a mediation process (which can be considered privileged only to a certain extent) to settle the case, but only considered the objective behavior of the Applicant

> in the false demonstration of some costs subject to reimbursement by the Administration (which was party to that management evaluation ("ME") process).

7. The Dispute Tribunal also held in *Fultang*, para. 28, that:

> although the fact that the MEU is an independent unit in the office of the USG/DM (with the task to conduct an impartial and objective evaluation of administrative decisions contested by staff members (as stressed in *Elmi* UNDT/2016/032), proceedings before the MEU are not comparable to the mediation run by the Ombudsman (where the parties are bound not to disclose privileged communications related to mediation attempts), because MEU is still part of the Administration and the ME process is a kind of administrative review of the administrative decision; therefore, the Administration can lawfully take into account the behaviour of the parties during the ME process, given its administrative nature (citations omitted).

8. The Appeals Tribunal affirmed these rulings in *Fultang* UNAT-2023-1403, para. 110, holding as follows:

> we agree with the UNDT's finding that the OIOS Investigation Report did "not refer to the communications between [Mr. Fultang] and his counsel (…) nor to exchanges during a mediation process (…) to settle the case, but only considered the objective behavior of [Mr. Fultang]". Mr. Fultang's argument to the contrary has no support of fact.

9. This Tribunal, therefore, holds that the issue has been fully litigated by the parties previously and thus is subject to the doctrine of *res judicata (*see *Kallon* 2017-UNAT-742). Thus, the subject documents are deemed admissible in these proceedings.

10. Moreover, even if the issue had not previously been adjudicated, the documents would still be deemed non-privileged and admissible.

11. First, no privilege attaches to communications with MEU. As noted by another Judge in the prior litigation, MEU is part of the Administration and the management evaluation process is an administrative review of administrative decisions. As such it is not akin to a mediation or settlement process to which some privileges attach.

12. Moreover, even to the extent that MEU had moved into the realm of mediation and settlement in this case, the privilege for settlement discussions is a limited one. For example, Rule 408 of the United States Federal Rules of Evidence[1] provides that:

> Evidence of the following is not admissible -on behalf of any party- either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction:
>
> > **(**1) furnishing, promising, or offering -or accepting, promising to accept, or offering to accept- a valuable consideration in compromising or attempting to compromise the claim; and
> >
> > (2) conduct or a statement made during compromise negotiations about the claim -except when offered in a criminal case and when the negotiations related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority.
>
> **(b) Exceptions.** The court may admit this evidence for another purpose, such as proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

13. The receipts themselves are neither statements nor conduct of the Applicant as contemplated by the Rule. They are documents that allegedly reflect the payment of monies by the Applicant before any settlement discussions in the prior litigation. As such, they are statements of the hotel that issued the receipts and not statements of the Applicant. Thus, the receipts are not even covered by the settlement discussion privilege.

14. Second, the validity or amount of a disputed claim is not in issue in this case. That claim was resolved by the prior settlement. The issue in this case is whether the Applicant committed misconduct by submitting fraudulent receipts in order to obtain the settlement proceeds. By its very nature, the privilege would not preclude the admission of allegedly fraudulent receipts in this disciplinary action.

[1] Federal Rules of Evidence, 2024 Edition, https://www.rulesofevidence.org/fre/article-iv/rule-408/. Accessed on 10 January 2024.

15. Finally, the Applicant waived any possible privilege that may have applied to these receipts. As noted in his submissions, the Applicant agreed in the settlement to accept reimbursement "for actual expenses", having been advised that "[t]hey will need receipts for anything that might be repaid". Thus, he submitted the receipts knowing that they would be shared with the Organization and not just retained by MEU.

16. In sum, the receipts are admissible as not privileged, any privilege having been waived, and the issue having already been judicially determined in the prior litigation.

Conclusion

17. In view of the foregoing, IT IS ORDERED that:

a. The Applicant's oral motion for a preliminary ruling is granted;

b. The receipts in question are admissible and the Applicant's objection to the receipts (and the OIOS report based thereon) is overruled;

c. A CMD in this case will take place on **Thursday, 18 January 2024 at 10 a.m.** (Nairobi Time, UTC +3) via Microsoft Teams; and

d. The parties or their duly designated representatives must attend the CMD. The Registry will provide a link to access the meeting.

(Signe0
Judge Sean Wallace
Dated this 11th day of January 2024

Entered in the Register on this 11th day of January 2024

(Signed)
René M. Vargas M., Officer-in-Charge, Nairobi