



Before: Judge Francis Belle

Registry: Nairobi

Registrar: Wanda Carter

NIGAM

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

ORDER ON CASE MANAGEMENT

Counsel for Applicant:

Patolla Niroop

Counsel for Respondent:

Esther Shamash, UNDP

Introduction

1. The Applicant is a former staff member, at the D-1 level, on a fixed-term appointment and was the United Nations Development Programme (“UNDP”) Resident Coordinator and Resident Representative in Riyadh at the time of the application.

2. On 23 July 2020, the Applicant filed an application with the United Nations Dispute Tribunal sitting in Nairobi to challenge the Respondent’s decision to not disclose the report of an investigation into his conduct, in which he was exonerated, but which he contends was conducted based on malicious complaints by two staff members. The Applicant contends that the investigative process resulted in him being harassed and subjected to undue stress and pressure. Further, the Applicant contends that his own complaints into the conduct of the two staff members should have been subjected to the same investigative rigours that were meted out to him.

3. On 29 July 2021, the Tribunal issued Judgment No. UNDT/2021/092 which dismissed the application as irreceivable. The Applicant appealed the Judgment which was set aside by the United Nations Appeals Tribunal (“UNAT”) in Judgment No. 2022-UNAT-1269. UNAT allowed the appeal in part. UNDT’s finding of irreceivability in Judgment No. UNDT/2021/092 was set aside and the case was remanded to the UNDT for a decision on its merits.

4. By motion dated 10 May 2023, the Applicant requested the Judge President of the UNDT to order that the undersigned Judge be recused on several grounds.

5. On 25 May 2023, the Judge President issued Order No. 92 (NBI/2023) in which the motion for recusal was refused.

6. On 23 June 2023, the Tribunal issued Order No. 112 (NBI/2023) in which these proceedings were suspended while the Applicant appealed Order No. 92 (NBI/2023) to UNAT.

7. On 18 July 2024, UNAT published Judgment No. 2024-UNAT-1446 ruling on the Applicant's appeal of Order No. 92 (NBI/2023). UNAT held that the appeal against UNDT Order No. 92 (NBI/2023) was not receivable.

8. On 31 July 2024, the Tribunal issued Order No. 96 (NBI/2024) in which it determined that considering UNAT's ruling, Order No. 92 (NBI/2023) stands and the proceedings in this case will now resume. It was also ordered that:

- a. The parties should inform the Tribunal whether an oral hearing is deemed necessary for proper adjudication of this matter;
- b. If an oral hearing was deemed necessary, then the parties should provide reasons in support of the holding of an oral hearing;
- c. The parties should file their list of witnesses and a justification of the relevance of the testimony they intend to adduce from each witness; and
- d. The parties should indicate their availability for an oral hearing that could be held between 1 September and 31 October 2024.

9. In response to Order No. 96 (NBI/2024), the Applicant filed the following list of witnesses and justifications of the relevance of the testimony he intends to adduce from each witness:

- a. His then supervisor, Mr. Mourad Wahba. The Applicant wishes to establish if Mr. Wahba was consulted, at the preliminary assessment stage of the investigation, on what he told the Office of Audit and Investigations ("OAI") on the role of the Applicant and his view if the Applicant was acting within the remit of his authority and responsibilities.
- b. Ms. Helen Clark, the Applicant's ultimate supervisor in his capacity as UNDP Resident Representative. The Applicant wishes to establish whether she was consulted on the matter and appraised of the Applicant's role and whether in her opinion the Applicant was simply conveying the wishes of the donor and acting within the remit of his authority and responsibility.

c. The OAI Director, Mr. Helge S. Osttveiten, in his role as the person responsible for initiating the preliminary assessment and deciding to undertake the investigation.

10. The Respondent made the following submissions in objection to the Applicant's proposed witnesses:

a. The information the Applicant intends to elicit from the proposed witnesses is immaterial to the propriety of either the preliminary assessment or the formal investigation.

b. Ms. Clark and Mr. Wahba are immaterial to the proper adjudication of this matter, for two reasons. First, the International Monetary Fund's Office of Internal Investigations ("OII/IMF") did not interview these former officials in the preliminary assessment. Calling them as witnesses to ascertain whether they were interviewed during the preliminary assessment consequently serves no purpose.

c. Second, two of the three former officials could not have been properly interviewed during the preliminary assessment for procedural reasons, because Messrs. Wahba and Osttveiten were also subjects in the OII/IMF's investigation. Allegations had been made against them that were also reviewed during the same preliminary assessment that resulted in the initiation of a formal investigation. Potential subjects are not interviewed at the preliminary assessment stage.

d. Had OII/IMF interviewed Messrs. Wahba and Østtveiten in the preliminary assessment of allegations of which they were potential subjects, this interview could have infringed on their due process rights as staff members, because their testimony would effectively have been compelled before they had been notified that they were subjects of investigation.

e. As regards Ms. Clark, the former UNDP Administrator was too far removed from the events to make her a material witness. The Applicant argues that OII/IMF should have sought Ms. Clark's "views" on the

Applicant's conduct, but preliminary assessments do not seek the views of the Administrator on a matter on which the Administrator has no direct knowledge. Had OII/IMF taken into consideration the Administrator's views of whether a formal investigation was warranted at the assessment stage, especially where she had no direct knowledge or evidence, such considerations would have been seen as compromising the independence of the investigatory process.

f. Neither the preliminary assessment nor the decision to initiate an investigation, which the Applicant intends to impugn on the basis of these witnesses' testimony, is a reviewable administrative decision. Neither the preliminary assessment nor the subsequent investigation following which the Applicant was exonerated of any allegations of misconduct, had any impact on the terms of the Applicant's former appointment. It follows from this that neither is a reviewable administrative decision. The Applicant's attempt to impugn these matters through an oral hearing is a waste of judicial resources.

Consideration

11. Article 16.1 of the Tribunal's Rules of Procedure stipulates that the judge hearing a case may hold oral hearings and that a hearing shall normally be held following an appeal against an administrative decision imposing a disciplinary measure.

12. Having reviewed the parties' arguments, the Tribunal is not convinced that there is a basis for hearing the three witnesses proposed by the Applicant. Even if the Applicant can show deficiencies in the decision-making process, he would not be able to establish what was in the mind of the two persons who made the complaint. Establishing deficiencies in the decision-making process does not establish that the two complainants were acting based on wilful, false, fabricated and malicious allegations against him.

13. Consequently, the Tribunal does not agree on a hearing to cross examine officers who can only be tested on due diligence. Weak due diligence does not prove the case against the individuals for bringing false allegations.

14. Considering the foregoing, the Tribunal reviewed the parties' submissions and having in mind art. 19 of its Rules of Procedure, does not consider that a hearing on the merits can add useful material to the case and will proceed to determine the matter based on the documents already on the record and any closing submissions filed.

Conclusion

15. In view of the foregoing, it is ORDERED THAT:

- a. The Applicant's motion requesting for an oral hearing is denied;
- b. The case will be determined on the basis of the documents on the case record; and
- c. The parties shall file their closing submissions, if any, by 5 p.m. (Nairobi time) on **Wednesday, 25 September 2023**.

(Signed)

Judge Francis Belle

Dated this 5th day of September 2024

Entered in the Register on this 5th day of September 2024

(Signed)

Wanda Carter, Registrar, Nairobi