



Before: Judge Alexander W. Hunter, Jr.

Registry: New York

Registrar: Nerea Suero Fontecha

MOHAMED

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

ON RECEIVABILITY

Counsel for Applicant:

Joseph Grinblat

Counsel for Respondent:

ALD, OHR, UN Secretariat

Introduction

1. The Applicant, a Human Resources Policy Officer with the International Civil Service Commission, filed an application contesting the decision of the Office for Internal Oversight Services (“OIOS”) not to provide her with a document stating the outcome of an investigation in which she is the complainant.
2. The Respondent claims that the application is not receivable and, in any event, without merit.

Facts

3. The Applicant presents the factual background as follows:

... On 9 November 2017, Applicant made an official complaint to OIOS about having been the victim of sexual harassment from the Chairman of [the International Civil Service Commission (“ICSC”), name redacted].

... Applicant asked a number of times to be informed about the result of the investigation, without any results.

... A number of publications in the media suggested that the investigation had found the accusation credible and that the [United Nations] Secretary General was personally involved in how to deal with the situation

... On 9 July 2018 Applicant’s legal counsel asked the Director of OIOS Investigation Division for a document indicating the result of the investigation.

... The Director replied the same day that OIOS would not issue any such document.

Procedural history

4. On 12 September 2018, the Applicant filed this application.
5. On the same day, the case was assigned to Judge Alessandra Greceanu and thereafter considered by her.

6. On 12 October 2018, the Respondent duly filed his reply.
7. On 16 October 2018, the Applicant filed a sur-reply to the Respondent's reply.
8. By Order No. 225 (NY/2018) dated 7 November 2018, Judge Greceanu ordered the parties to (a) inform the Tribunal by 30 November 2018 if additional evidence would be requested to be produced or if the case could be decided on the papers before it and, (b) in case no further evidence was requested, to file their closing submissions both on receivability and on the merits by 21 December 2018.
9. On 18 and 21 December 2018, the Applicant and the Respondent, respectively, filed their closing statements.
10. On 22 December 2018, the General Assembly decided not to extend the *ad litem* judge position in New York, which expired on 31 December 2018 (see General Assembly resolution 73/276 [Administration of Justice at the United Nations]).
11. On 11 January 2019, the case was reassigned to the undersigned Judge.

Consideration

Receivability

12. In the Respondent's closing statement of 21 December 2018, he contends that the application is not receivable *ratione materiae*. The Applicant does not challenge an administrative decision capable of review by the Dispute Tribunal. Under art. 2.1(a) of its Statute, the Dispute Tribunal has jurisdiction to hear an appeal against an "administrative decision". "Administrative decision" has been defined in the former Administrative Tribunal Judgment No. 1157 *Andronov* (2004) to mean that "administrative decisions are characterized by the fact that they are taken by the Administration, they are unilateral and of individual application, and they carry direct

legal consequences”. The Applicant may only challenge a final administrative decision that affects the terms of her appointment.

13. The Respondent argues that the contested decision did not have any direct legal consequences for the Applicant and is not capable of review by the Dispute Tribunal. In the Respondent’s closing statement, other than the general reference to *Andronov*, he makes no arguments explaining why a decision of the Office for Internal Oversight Services (“OIOS”) not to provide a complainant with a document stating the outcome of an investigation should not be an appealable administrative decision. In contrast, in the Respondent’s reply, reiterating the explanation provided by the Management Evaluation Unit dated 17 August 2018 in response to the Applicant’s request for management evaluation, he indicated that the OIOS could not provide the Applicant with a document stating the outcome of the investigation because this investigation was still ongoing.

14. The Applicant makes no submissions on the question of receivability in any of her pleadings.

15. The Tribunal observes that art. 2.1(a) of the Dispute Tribunal’s Statute provides that,

1. The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual, as provided for in article 3, paragraph 1, of the present statute, against the Secretary-General as the Chief Administrative Officer of the United Nations:

(a) 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 noncompliance....

16. The relevant administrative issuance pursuant to art. 2.1(a) governing a situation like the one embodied in the present case is ST/SGB/2008/5 regarding prohibition of discrimination, harassment, including sexual harassment, and abuse of

authority. Section 5.18 of ST/SGB/2008/5 outlines the duty of “the responsible official” to inform the complainant (or in the terminology of ST/SGB/2008/5, “the aggrieved individual”), in the present case that being the Applicant, as follows:

5.18 On the basis of the report, the responsible official shall take one of the following courses of action:

(a) If the report indicates that no prohibited conduct took place, the responsible official will close the case and so inform the alleged offender and the aggrieved individual, giving a summary of the findings and conclusions of the investigation;

(b) If the report indicates that there was a factual basis for the allegations but that, while not sufficient to justify the institution of disciplinary proceedings, the facts would warrant managerial action, the responsible official shall decide on the type of managerial action to be taken, inform the staff member concerned, and make arrangements for the implementation of any follow-up measures that may be necessary. Managerial action may include mandatory training, reprimand, a change of functions or responsibilities, counselling or other appropriate corrective measures. The responsible official shall inform the aggrieved individual of the outcome of the investigation and of the action taken;

(c) If the report indicates that the allegations were well-founded and that the conduct in question amounts to possible misconduct, the responsible official shall refer the matter to the Assistant Secretary-General for Human Resources Management for disciplinary action and may recommend suspension during disciplinary proceedings, depending on the nature and gravity of the conduct in question. The Assistant Secretary-General for Human Resources Management will proceed in accordance with the applicable disciplinary procedures and will also inform the aggrieved individual of the outcome of the investigation and of the action taken.

17. However, it is not clear from the Respondent’s closing statement whether the OIOS investigation has now been completed as no reference is any longer made to it not being finished. It is therefore no longer clear to the Tribunal whether the investigation is actually ongoing or not and whether a decision has been made to inform the Applicant about the outcome. The Tribunal notes that it is very unfortunate that the Respondent is not providing this information.

18. The Tribunal observes that art. 2.1(a) of the Dispute Tribunal's Statute provides that,

1. The Dispute Tribunal shall be competent to hear and pass judgement on an application filed by an individual, as provided for in article 3, paragraph 1, of the present statute, against the Secretary-General as the Chief Administrative Officer of the United Nations:

(a) 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 noncompliance....

19. Accordingly, the Tribunal can only review an administrative decision that has already been taken and not one that is still pending. If the investigation is still ongoing, the application is therefore premature and not receivable under art. 2.1(a) of the Statute.

20. Nevertheless, the Tribunal notes that it is competent to raise a receivability issue on its own initiative as confirmed by the Appeals Tribunal in, for instance, *Tintukasiri et al.* 2015-UNAT-526, para. 32, where it held that:

... Initially, the Appellants complain that the Dispute Tribunal exceeded its competence when it raised *sua sponte* the question of whether the applications were receivable *ratione materiae* in Order No. 14. There is no merit to this complaint. As our jurisprudence makes clear, the Dispute Tribunal "is competent to review its own competence or jurisdiction" under Article 2(6) of the UNDT Statute and "[t]his competence can be exercised even if the parties or the administrative authorities do not raise the issue, because it constitutes a matter of law [...]". [*Christensen* 2013-UNAT-335, paras. 20-21 and *Chahrour* 2014-UNAT-406, paras. 28-29].

21. In this regard, the Tribunal notes that, in any event, even if the OIOS investigation has been completed and it has been decided not to inform the Applicant about the outcome, pursuant to staff rule 11.2(a), such decision would first need to undergo management evaluation before being appealed to the Dispute Tribunal as it

would not constitute a decision exempted from such requirement under staff rule 11.2(b). Also, in this situation the application would not be receivable.

22. Consequently, no matter what the situation is—if a decision has been made on providing the Applicant information on the OIOS investigation or not—the application is not receivable.

Observation

23. The Tribunal observes that, in the Respondent's reply, under the heading, "Identify any facts or matters in the Application that are disputed by the Respondent", it is stated that, "All of the Applicant's allegations are denied, except where expressly admitted in this Reply". However, nowhere in the reply is any of the Applicant's factual allegations expressly admitted or even as much as mentioned. The disclaimer therefore stands as a general objection against all facts stated in the application. This makes no sense as most of these facts (see *supra*) only appear to be included to provide a contextual perspective to the case and have no controversial character. In the spirit of transparency, judicial economy and accountability, the Tribunal is bewildered why the Respondent does not instead indicate that, unless otherwise stated, he concurs with all facts submitted by the Applicant and then highlights the matters that, as a matter of fact, he disputes and on which the case would then turn. Also, the Tribunal does not understand why the Respondent does not clearly state whether the OIOS investigation is still ongoing or not.

24. The Tribunal notes that the Redesign Panel in its report on the United Nations system of administration of justice (A/61/205) of 28 July 2006, *inter alia*, stated that it undertook "its assignment and presents its findings and recommendations — in the hope that the internal justice system will be fundamentally redesigned to achieve expeditious, efficient and effective justice that is independent and also guarantees the rule of law as an indispensable component of the management of the United Nations". The Redesign Panel added that it "believes that reform of the internal

justice system is a *sine qua non* for broader management reform of the Organization. A large part of the current management culture in the Organization exists because it is not underpinned by accountability. Accountability can be guaranteed only by an independent, professional and efficient internal justice system” (see para. 13).

25. These general principles set out by the Redesign Panel were subsequently endorsed by the General Assembly when founding the current internal justice system and have since that time often been reiterated. For instance, in General Assembly resolution 61/261 (Administration of Justice at the United Nations) under the heading, “New system of administration of justice”, it was stated that:

The General Assembly

4. *Decides* to establish a new, independent, transparent, professionalized, adequately resourced and decentralized system of administration of justice consistent with the relevant rules of international law and the principles of the rule of law and due process to ensure respect for the rights and obligations of staff members and the accountability of managers and staff members alike;

5. *Recognizes* that the introduction of the new system of administration of justice should, inter alia, have a positive impact on staff-management relations and improve the performance of both staff and managers;

6. *Stresses* the importance of increased transparency in decision-making and increased accountability of managers for the system....

26. General disclaimers, as those of the Respondent in the present case by not disclosing essential information, unnecessarily complicate the judicial review of the Tribunal because the factual basis on which a judicial determination is to be made is then obscured. This creates a risk that the judicial proceedings are derailed and delayed, which may even lead to unjust and incorrect results, and therefore also constitutes an unproductive obstruction to a fair, transparent and efficient legal process as otherwise envisioned by the General Assembly. Albeit not in this case, this may lead to a finding of abuse of process and costs under art. 10.6 of the Dispute Tribunal’s Statute.

Conclusion

27. The application is rejected as not receivable.

(Signed)

Judge Alexander W. Hunter, Jr.

Dated this 26th day of March 2019

Entered in the Register on this 26th day of March 2019

(Signed)

Nerea Suero Fontecha, Registrar