



Before: Judge Coral Shaw

Registry: Nairobi

Registrar: Abena Kwakye-Berko

BIRYA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:

Self-represented

Counsel for the Respondent:

Katya Melliush, UNON

Alan Gutman, UNON

Introduction

1. The Applicant challenges what he describes as the:

decision by a fact finding panel formed by the Director-General of UNON on 11 September 2013 pursuant to ST/SGB/2008/5 on Prohibited Conduct to delay its commencement of business for over 2 months from its formation consequently failing to make a determination and publication of its report within regulation of section 5.17 of the ST/SGB/2008/5.

2. He requests the Tribunal to resolve:

a. Whether the inordinate long delay by the fact-finding Panel to make a determination and publication of its report is in conformity with the provisions of section 5.17 of ST/SGB/2008/5 (Prohibition of discrimination, harassment, and abuse of authority); and

b. Whether the fact-finding panel is in breach of duty in delaying the release of the report.

3. The Respondent alleges that the Application is not receivable. The Tribunal sought the Applicant's submissions on receivability. These were filed on 24 June 2014. The Tribunal is satisfied that it has sufficient evidence and submissions to make findings on the papers without the need for an oral hearing

Facts

4. On 18 February 2013, the Applicant filed a complaint of prohibited conduct with the Director-General of UNON (DG). A fact-finding panel (the panel) was constituted on 11 September 2013 to investigate the complaint. The Applicant challenged, inter alia, the delay in setting up this panel. The Respondent submitted that the challenge was not receivable.

5. By Order No. 062 (NBI/2014) dated 28 March 2014, the Tribunal held that the challenge was receivable and issued a substantive judgment in *Birya* UNDT/2014/092 dated 1 July 2014 in which it found that the delays in constituting the fact-finding panel was a breach of duty by the DG.

6. On 13 November 2013, the panel invited the Applicant to appear before it as complainant. Following his interview he was advised that the panel was initiating further enquiries as he had raised a number of matters of which the panel had not been aware. The panel told the Applicant that it would not be in a position to complete its investigation and report as soon as it would have liked and asked him to bear with it.

7. On 23 December 2013 the Applicant wrote to the chair of the panel advising, inter alia, that he had no issue with the delay.

8. On 7 February 2014 the Applicant requested management evaluation of the decision of the panel to delay its commencement of business for over two months from its formation and failing to make a determination and report within the regulation of section 5.17 of the SGB.

9. The Management Evaluation Unit (MEU) report dated 13 February 2014 found that as the preliminary investigation phase was on-going, the request for management evaluation was premature and not receivable.

10. On 30 April 2014 in response to an email from the Applicant¹, the chair of the panel said that she appreciated his concern regarding the length of time that the fact-finding investigation had taken and gave a number of reasons which in her view took the case out of the normal situation where a report would be expected within three months as required by ST/SGB/2008/5. She referred to new evidence and additional information that continued to be brought to the panel's attention. She advised the Applicant that the final witness had been interviewed and the investigation was in its final phase. She stated:

Our intention is to complete the remaining work and submit our report to the Director-General by mid-June. I shall be writing to the DG under separate cover today so that she is aware of our timeline.

11. The Applicant filed the present Application on 5 May 2014. There is no evidence that the fact-finding report has been finalised as at the date of this judgment.

¹ The Applicant's email was not disclosed to the Tribunal.

Receivability

Submissions

12. The Respondent submits that the Application is not receivable. In summary his contentions are:

a. The time taken for a fact-finding panel to conduct its investigation and issue a report does not constitute an administrative decision for the purposes of art. 2.1(a) of the Statute. In the formal procedure to investigate the Applicant's complaint of prohibited conduct, all investigative steps are preliminary.

b. The Applicant may only challenge procedural aspects of the work of the panel once a final decision has been taken at the conclusion of the formal procedures. The principle in selection and evaluation cases is that any issue regarding the conduct of the formal procedures is not ripe for review until the procedures have reached their final conclusion. This should also apply to preliminary steps during the formal process to address a complaint of prohibited conduct which comprise a series of steps to be taken during the formal process. The Respondent cites *Nwuke* 2010-UNAT-099; *Ishak* 2011-UNAT-152 and *Gehr* 2013-UNAT-313 in support of this proposition.

c. The Respondent further submits that *Birya* Order No. 062 (NBI/2014) which found the Applicant's prior claim to be receivable is inconsistent with the jurisprudence of UNAT which was further enunciated in *Masyllkanova* 2014-UNAT-412.

13. In reply, the Applicant's submissions are:

a. That as the Application complies with all of the conditions in art. 8 of the Tribunal's Statute, it is properly before the Tribunal and is receivable.

b. The Administration has a duty to ensure that complaints of harassment or abuse of authority are investigated in strict compliance with ST/SGB/2008/5.

c. The Administration has not acted in compliance with his terms of employment which include all pertinent regulations and rules.

d. The Applicant is not only the victim of abuse of authority and harassment but also a victim of the administration's neglect or intentional neglect of his complaint.

e. The Applicant relies on Order No. 062 (supra) and section 5.20 of ST/SGB/2008/5 as well as the requirement in section 2.2 of the SGB for the Organisation to provide effective remedies.

Considerations

Receivability

14. Section 5.17 requires the report of a fact-finding panel to be submitted to the responsible official normally no later than three months from the date of the submission of the complaint. In this case, the process has been delayed beyond the recommended time frame in ST/SGB/2008/5.

15. The first question is whether the Applicant's challenge to the procedure of investigation into a complaint of prohibited conduct under ST/SGB/2008/5 before the outcome of the investigation is complete is receivable.

16. Article 2.1 of the Statue of the Tribunal provides that the Tribunal is competent to hear and pass judgement on an appeal of an administrative decision that is alleged to be in non-compliance with the terms of employment. The terms of appointment include all pertinent regulations and rules in force at the time of alleged non-compliance.

17. In relation to the procedures in the Staff Rules for selection for posts and performance evaluation, it is well settled² that preparatory decisions which lead to administrative decisions do not in themselves adversely affect a staff member's legal situation "since they modify neither the scope nor the extent of his or her rights." This principle does not, however, necessarily apply to the process for determining complaints under ST/SGB/2008/5.

18. In *Nwuke* UNDT/2010/017, the UNDT was asked, inter alia, to cause the administration to treat as expeditiously as possible the staff member's complaint of victimisation by Advisory Selection Panels. The UNDT held that this was not a receivable challenge to an administrative decision. However, on appeal in *Nwuke* UNAT-2010-099, the Appeals Tribunal (UNAT) held that the claims were receivable.

19. UNAT held that if an individual is dissatisfied with the outcome of administrative procedures he or she may request judicial review of the decisions. It affirmed that an administrative decision includes an omission to act and stated:

..... whether or not the UNDT may review a decision not to undertake an investigation, or to do so in a way that a staff member considers breaches the applicable Regulations and Rules will depend on the following question: Does the contested administrative decision affect the staff member's rights directly and does it fall under the jurisdiction of the UNDT?

In the majority of cases, not undertaking a requested investigation into alleged misconduct will not affect directly the rights of the claimant, because a possible disciplinary procedure would concern the rights of the accused staff member.

20. UNAT went on to describe how ST/SGB/2008/5 creates rights and found that in relation to that SGB, the application by the applicant in *Nwuke* was receivable.

21. In *Birya* Order No. 062 (NBI/2014) on receivability, this Tribunal held,

² *Gehr* Order No. 80 (GVA/2014) and *Ishak* 2011-UNAT-152.

30. The provisions of ST/SGB/2008/5 exceptionally create important interim rights for staff members of the United Nations Secretariat who complain of prohibited conduct. The ST/SGB expressly places a duty on managers to act promptly and to preserve the integrity of the process to protect staff members from intimidation or retaliation. In addition section 5.20 of ST/SGB/2008/5 provides that an aggrieved individual who has grounds to believe that the procedure followed in respect of allegations of prohibited conduct was improper may appeal pursuant to chapter XI of the Staff Rules. This section allows an aggrieved individual to challenge the procedures followed before the finalization of the fact-finding investigation.

31. Because of the absolute prohibition of prohibited conduct in the workplace, a failure to act promptly and to maintain the integrity of the formal processes is not just a procedural omission but a breach of duty which may impact on the right of a staff member to be free of intimidation and retaliation.

22. Similarly in *Gehr* UNDT 2012-095, in reliance on *Nwuke* 2010-UNAT-099, the Tribunal held that the Tribunal has jurisdiction to examine the Administration's actions and omissions following a request for investigation submitted pursuant to ST/SGB/2008/5.

23. The Respondent submits that the UNAT case of *Masyllkanova* is inconsistent with this Order. In *Masyllkanova*, UNAT confirmed the UNDT finding (which was supported by the Respondent) that the applicant's case was both moot because a flawed fact-finding panel had been reconvened and was not receivable because the applicant had not requested management evaluation of the contested issue. The issue before the Tribunal in the present case was not addressed. The Tribunal holds that the facts and circumstances of that case are distinguishable from the present case.

24. Finally, the Tribunal observes that, if accepted, the proposition that a staff member is unable to challenge the delay in resolving claims under ST/SGB/2008/5 until an outcome of his or her complaint of prohibited conduct is finalised could result in further delays and an unacceptable barrier to justice for claimants in the Applicant's situation.

25. In summary:

a. The Tribunal has the jurisdiction to review an act or omission which modifies the rights of a staff member conferred by his or her terms of employment including applicable regulations and rules.

b. The omission of the Administration to act promptly on a complaint as required by ST/SGB/2008/5 is an administrative decision which may be reviewed by the Tribunal before the outcome of the process has been determined by the administration.

Conclusion

26. The Tribunal holds that the allegation of a breach of an administrative decision in this Application is receivable.

The Merits

27. The documentary evidence submitted in this case shows that, following a delay of seven months to convene the fact-finding panel³, the investigation took longer than anticipated due to the need to investigate new information that came to the attention of the panel⁴. The Chair of the panel told the Applicant in writing that the report would be completed by mid-June 2014 but as at the date of this judgment, no report has been produced. Eighteen months have elapsed from the receipt of the complaint in February 2013 to the present. Eleven months have elapsed since the fact-finding panel was convened.

28. Under section 2.2 of the SGB, the Organisation has the duty to take all appropriate measures to protect its staff from exposure to any form of prohibited conduct and to provide effective remedies when prevention has failed. Section 5.3 imposes on managers and supervisors a duty to take prompt and concrete action in response to allegations of prohibited conduct.

³ The subject of *Birya* UNDT/2014/092.

⁴ The complaint was submitted by the Applicant on 13 February 2013. The panel was set up on 11 September 2013.

29. Section 5.17 states that the “(panel’s) report shall be submitted to the responsible official normally no later than three months from the date of the submission of the formal complaint or report.”

30. The Tribunal has consistently found that delays of some months is a breach of that duty. For example, in *Benfield-Laporte* UNDT/2013/162, the Tribunal found that a six-month delay obviously did not meet the requirement of promptness. In *Nwuke* UNDT/2013/157 and *Haydar* UNDT/2012/201, delays of seven months were held to have been in breach.

31. The Tribunal notes that in this case the panel cannot be responsible for all the delay. It did not receive its instructions until some seven months after the Applicant’s complaint was first made. However, since then the investigation and report have been excessively delayed

32. The Tribunal finds that the ST/SGB/2008/5 requirement for the administration to act promptly on complaints of prohibited activity has not been observed in the case of the Applicant’s complaint. It notes that explanations for the delay by the panel up to May have been given to the Applicant who said in December 2013 that he had no issue with the delay. To an extent that mitigates the breach.

33. Before making a decision on what remedies, if any, that the Applicant is entitled to arising from this non observance, the Tribunal requires more information on the present state of the process and in any event finds that this is a case that is suitable to remand for institution or correction of the required procedure.

34. The procedure required by the ST/SGB is for the panel’s report to be submitted to the responsible official who will then take one of three courses of action prescribed by section 5.18.

35. Article 10.4 of the Statute of the Tribunal provides that:

Prior to a determination of the merits of a case, should the Dispute Tribunal find that a relevant procedure prescribed in the Staff Regulations and Rules or applicable administrative issuances has

not been observed, the Dispute Tribunal may, with the concurrence of the Secretary-General of the United Nations, remand the case for institution or correction of the required procedure, which, in any case, should not exceed three months. In such cases, the Dispute Tribunal may order the payment of compensation for procedural delay to the applicant for such loss as may have been caused by such procedural delay, which is not to exceed the equivalent of three months' net base salary.

36. As such, a remand requires the concurrence of the Secretary-General, the Tribunal will suspend the proceedings to enable the Secretary-General to consider his position and advise the Tribunal accordingly.

ORDER

37. The proceedings are suspended until 5 September 2014.

38. By 5 September 2014 the Secretary-General is to advise the Tribunal:

- a. of the present position of the investigation into the Applicant's complaint of prohibited conduct dated 13 February 2013;
- b. if he concurs with the remand of this case for institution and correction of the procedure under ST/SGB/2008/5.

(Signed)

Judge Coral Shaw

Dated this 25th day of August 2014

Entered in the Register on this 25th day of August 2014

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi