



Before: Judge Coral Shaw

Registry: Nairobi

Registrar: Abena Kwakye-Berko

SYRJA

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT ON RECEIVABILITY

Counsel for the Applicant:

Nicole Washienko, OSLA

Counsel for the Respondent:

Steven Dietrich, ALS/OHRM

Alister Cumming, ALS/OHRM

Introduction

1. The Applicant, a Security Officer with the Opération des Nations Unies en Côte d'Ivoire (ONUCI), filed an Application with the Tribunal contesting a decision of the United Nations Claims Board (UNCB) to deny his claim for compensation for personal effects looted and/or destroyed at his residence in Daloa following post-election violence in Côte d'Ivoire. He did not submit the contested decision for management evaluation.

2. In his reply, the Respondent alleges that the Application is not receivable and in any event is without merit.

3. The Tribunal has decided receivability as a preliminary issue.

Procedural history

4. The Applicant filed the current Application on 19 March 2014.

5. The Respondent submitted a Reply on 24 April 2014 by which he asserts that the Application is not receivable because the Applicant failed to request management evaluation of the contested decision under staff rule 11.2(c).

6. The Applicant filed his response to the Respondent's assertion of non-receivability on 29 May 2014.

7. The Tribunal ordered the Respondent, by Order No. 224 dated 26 June 2015, to provide further evidence regarding the delegation of the Secretary-General's authority in staff rule 11.2(b) to the Management Evaluation Unit (MEU).

8. The Applicant filed his observations on the Respondent's Reply on 14 August 2014.

9. The parties have requested that the case should be decided on the papers without an oral hearing. The Tribunal is of the view that an oral hearing is not required in this case and will determine receivability as a preliminary issue based

on the submissions filed by the parties.

Facts

10. In 2011, the Office of Staff Legal Assistance (OSLA), on behalf of another staff member, submitted to MEU a request for management evaluation of a decision by UNCB. On 16 September 2011, MEU made a formal determination that the UNCB is a technical body. In this judgment this will be referred to as Determination A. The determination has been redacted to preserve the confidentiality of the staff member in that case.

11. Determination A stated:

This is in reference to your correspondence dated..., addressed to the Management Evaluation Unit, requesting management evaluation concerning the denial of your lump sum claim in respect of personal effects lost or damaged...in July 2010. Following a preliminary review of your case, we have determined that your case is not receivable at the MEU.

(The determination then quotes Staff Rule 11.2(d))

The MEU notes that the request for management evaluation was taken on the advice of the United Nations Claims board, which is a technical body for the purposes of Staff Rule 11.2(b) and accordingly, you are not required to submit a request for management evaluation....

(The determination then cites Staff Rule 11.4(b))

In light of the forgoing, you may proceed to file your appeal directly with the United Nations Dispute Tribunal (UNDT) in accordance with Staff Rule 11.4(b).

12. In the present Application to the Tribunal, which was filed by OSLA on behalf of the Applicant on 19 March 2014, the question, “Have you requested a management evaluation of the contested decision?” was answered “No, not permitted by Staff Rules 11.2(b) and 11.4(b)”.

13. On 23 March 2014, Counsel for the Respondent requested comments from MEU as to whether MEU maintained its past interpretation of UNCB being a technical body.

14. MEU responded by email dated 22 April 2014 (Determination B) to Counsel that:

[A]s per ST/SGB/2010/9 the MEU conducts evaluations of contested administrative decisions and in case it finds a request not receivable, it will so inform the staff member.

The UN Claims Board is a body composed of staff members who make recommendations to the Controller on claims by staff members for the loss of or damage to personal effects attributable to service (ST/AI/149/Rev. 4). The UN Claims Board members are not required to have particular technical skills, and make their recommendations under the applicable UN internal rules. On the basis of this, the MEU determined that the UNCB is not a technical body in the sense of Staff Rule 11.2(b).

15. On 24 April 2014, the Respondent filed his reply.

Respondent's submissions

16. The Respondent submitted that the Application is not receivable as the Applicant did not request management evaluation of the contested decision within the required deadline of 18 February 2014. He was required to request management evaluation because the contested decision was not taken pursuant to the advice of a technical body under staff rule 11.2(b).

17. The Respondent acknowledges that on a past occasion MEU found that the UNCB was a technical body but distinguishes that case from the present because it was never adjudicated by the Dispute Tribunal but withdrawn at an early stage of the case.

18. The Respondent submits that it is not for the Tribunal to step into the shoes of the Secretary-General and determine what constitutes a technical body given the wording of staff rule 11.2(b). The determination about what constitutes a technical body is for MEU to make on the Secretary-General's behalf. This determination falls within the exclusive authority of the Secretary-General as exercised by MEU pursuant to staff rules 11.2, 11.4, article 8 of the Dispute Tribunal's Statute and ST/SGB/2010/9 (Organization of the Department of Management).

19. In his reply to the Tribunal's request for the Respondent to provide evidence of the delegation of the Secretary-General's authority, the Respondent submitted a statement from MEU in which it is stated, "[t]he MEU does not determine what constitutes a technical body". It went on to state that:

[I]n carrying out our function to assess the receivability of a request the Unit does need to make a determination as to whether Rule 11.2(b) applies... In the absence of an administrative issuance the MEU makes a determination of what is a technical body based on what was considered to be a technical body under the old system.

Applicant's submissions

20. The Applicant submits that MEU does have the authority to determine for the Secretary-General which entities constitute technical bodies for the purpose of staff rule 11.4(b) and once it has exercised its authority to make this determination for the Secretary-General it cannot change its determination.

21. The doctrine of *functus officio* applies. When a decision-maker has statutory authority to make a decision he is barred from revisiting it once it has been perfected. As soon as the entity fulfills its statutory mandate by rendering the decision that is expected of it, it is *functus officio*. One of the purposes of the doctrine is to give finality to administrative decisions and provide predictability.

22. MEU has a statutory duty to assess whether complaints brought before it are receivable. Since it has previously determined that complaints against UNCB are not receivable because UNCB is a technical body it cannot change its decision.

23. The doctrine of estoppel bars the Respondent from asserting that the UNCB is not a technical body. It has taken a position wholly contradictory to its prior determination. Equity should prevent the Respondent from now asserting that the UNBC is not a technical body.

24. The Applicant should not be penalized for the Secretary-General's failure to meet his obligation to identify which bodies are technical bodies.

25. Since staff rule 11.2(b) was promulgated the Secretary-General has not identified a single “technical body”. This has led to a significant lack of clarity and confusion.

26. Contrary to the assertion of the Respondent, the UNCB is a technical body. Its role is to act in an advisory capacity to the Controller and to transmit its recommendation regarding the settlement of each claim to the Controller for decision.

Considerations

27. The powers of MEU conferred by ST/SGB/2010/9 include conducting an impartial and objective evaluation of administrative decisions contested by staff members of the Secretariat to assess whether the decision was made in accordance with the Organization’s rules and regulations.

28. Pursuant to staff rule 11.2(c), MEU may determine if a request for management evaluation is receivable in relation to the time limits for filing the request. MEU must also consider under staff rule 11.2(b) if the staff member is wishing to formally contest an administrative decision taken pursuant to advice obtained from technical bodies, as determined by the Secretary-General. In such a case, the staff member is not required to request management evaluation.

29. The determination of whether a body is a technical body is made by MEU on behalf of the Secretary-General.

30. In the present case, the Respondent does not deny that in Determination A MEU determined that UNCB is a technical body but he now seeks to retract from that determination.

31. The Tribunal finds that in Determination A, MEU made a quasi-judicial decision by way of a formal pronouncement on the receivability of a specific request for management evaluation of a decision made by UNCB. This determination was communicated to a staff member who acted on the advice to file directly with the Tribunal.

32. Determination A was a formal notification of a decision made on behalf of the Secretary-General. It was contained in an official document. Whether or not that case proceeded to a final judgment by the Tribunal, Determination A represents the decision of the Secretary-General that UNCB is a technical body for the purpose of staff rule 11.2(b) until or unless it is formally revoked and such revocation is notified to staff members.

33. The contrary advice by MEU in Determination B is not a formal determination by MEU. It was contained in an email to the Respondent's Counsel for the purposes of litigation after the present Application was filed. It was not given as a result of a request for management evaluation. By the time it was disclosed it was too late for the Applicant to request management evaluation.

34. The Applicant is a person affected by Determination A. His case concerned the same issue, namely the denial of a lump-sum claim for damage to personal effects. As it was an official determination by MEU he was entitled to and did rely on the decision that in a case such as his management evaluation was not required by staff rules 11.2(b) and 11.4(b). In these circumstances the question of whether UNCB is a technical body is moot. It was decided by Determination A and the Respondent is estopped from re-litigating it.

35. In a different context from this present case, the United Nations Appeals Tribunal (the Appeals Tribunal) criticised contradictory submissions made by the Secretary-General before the UNDT and the Appeals Tribunal. In *Wu* 2010-UNAT-042, the Appeals Tribunal stated, “[i]t is not expected of the United Nations to raise such contradictory pleas. The United Nations should act as an ideal litigant and display a clear and consistent stand on all important issues”.

36. This fundamental standard should guide the Respondent in all issues before the Tribunals.

37. In exercising its powers to decide receivability of requests for management evaluation, MEU acts as a gatekeeper for staff members' access to the formal part of the United Nations internal justice system. As a representative and delegate of the

Secretary-General, MEU is obliged to take a consistent and transparent stand on matters which impact on the accessibility of staff members to the internal justice system. ST/SGB/2010/9 requires MEU to be objective and impartial.

38. The Respondent challenged the receivability of the Applicant's claim based on advice from MEU that was known to be inconsistent with its previous determination. This case does the Secretary-General no credit. Whether intentional or not, it conveys the appearance of a determined effort by his delegates to deny the Applicant the right to have the merits of his case heard and decided by the Tribunal - effectively to deny him access to justice. This does not demonstrate the objective and impartial attitude required by ST/SGB/2010/9.

39. It is not the role of the Tribunal to decide whether UNCB is a technical body. That decision was made in Determination A and should be abided by both the Tribunal and the Respondent.

Conclusion

40. By rendering Determination A, the MEU became *functus officio*. In the absence of a formal determination revoking it, the Respondent is bound by that determination and is estopped from asserting in this case that UNCB is not a technical body.

41. The Tribunal finds that according to Determination A, UNCB is a technical body for the purpose of staff rule 11.2(b) and therefore the Applicant was not required to request management evaluation before applying to the Tribunal.

42. The Application to the Tribunal was filed within 90 days of the decision and is therefore in time and receivable.

(Signed)

Judge Coral Shaw

Dated this 2nd day of October 2015

Entered in the Register on this 2nd day of October 2015

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi