



Before: Judge Goolam Meeran

Registry: Nairobi

Registrar: Abena Kwakye-Berko

TADONKI

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

Counsel for the Applicant:
Self-represented

Counsel for the Respondent:
Kong Leong Toh, UNOPS

Facts and Procedural History

1. The contested decision in this case concerns the refusal by the Respondent to disclose to the Applicant an unredacted copy of his Performance Appraisal Rebuttal Panel Report, with the names and signatures of the rebuttal panel members who had, on 19 July 2011, considered his rebuttal statement challenging his performance rating for 2010/2011. On 29 July 2011, the Applicant was informed that the Executive Director of the United Nations Office for Project Services (UNOPS) had decided to uphold his overall performance rating.

2. The Applicant commenced employment with UNOPS on 15 July 2010. Until 31 July 2011, he served as Director of the UNOPS Cote d'Ivoire Office.

3. As a former staff member of UNOPS the Applicant is entitled under articles 3.1(a) and (b) of the Statute of the United Nations Dispute Tribunal (UNDT) to initiate proceedings before the UNDT provided that he complies with the requirements of receivability of claims.

4. On 24 February 2015, more than three years after he left the employment of UNOPS, the Applicant formally requested access to his Performance Appraisal Rebuttal Panel Report.

5. On 4 March 2015, UNOPS sent him the Report with the names and signatures of the panelists redacted.

6. On 5 March 2015, the Applicant filed a Motion requesting that the Tribunal order the Respondent to disclose a copy of the unredacted report.

7. Under art. 9 of its' Statute, UNDT may order production of documents or such other evidence as it deems necessary. The Tribunal has wide case management powers as is evident from articles 18 and 19 of its Rules of Procedure which insofar as they are material to this case provide:

Article 18 Evidence

2. The Dispute Tribunal may order the production of evidence for either party at any time and may require any person to disclose any document or provide any information that appears to the

Dispute Tribunal to be necessary for a fair and expeditious disposal of the proceedings.

3. A party wishing to submit evidence that is in the possession of the opposing party or of any other entity may, in the initial application or at any stage of the proceedings, request the Dispute Tribunal to order the production of the evidence.

Article 19 Case management

The Dispute Tribunal may at any time, either on an application of a party or on its own initiative, issue any order or give any direction which appears to a judge to be appropriate for the fair and expeditious disposal of the case and to do justice to the parties.

8. As would be evident from these provisions, whether the UNDT makes an order for disclosure on its own motion or on request by a party, such a request, as it applies to an applicant has to be made either at the time an application is filed or at any stage thereafter in the course of proceedings.

9. At the time of the Applicant's initial filing, on 5 March 2015, he did not have an existing claim before the Tribunal. However, insofar as the Applicant intended this filing to constitute the initiation of a claim, it could have been accompanied by a request for disclosure of a relevant document. However, as the matter stood on 5 March 2015, the Application was solely for disclosure of his unredacted rebuttal panel report. There was no substantive claim, nor any evidence that a request for management evaluation had been submitted.

10. In the circumstances, his filing was not accepted by the Registry and he was advised to resubmit his claim by using the prescribed form. The Tribunal notes that the prescribed form makes adequate provision for all the relevant prescribed information to be provided so that it acts as a reminder to a potential applicant that certain required information has to be provided in order to constitute a valid claim.

11. Bearing in mind that the proceedings of the rebuttal panel had been completed and notified to the Applicant in July 2011, it is also noteworthy that there was no request that the Tribunal should waive the deadlines pursuant to art. 35 of the UNDT Rules of Procedure.

12. The record shows that on 24 February 2015, the Applicant made a written request to the Respondent for a copy of his Performance Appraisal Rebuttal Report. The Respondent responded to the Applicant's request on 4 March 2015 by providing him with a *redacted* copy of the Report. It is immediately upon receipt of the redacted Report that the Applicant filed his motion to compel disclosure of an unredacted copy of the same Report.

13. It is the Applicant's case that the reason for the delay of over three years is that shortly prior to the request he received information that caused him to believe that something untoward had occurred during the discussion and deliberations of the Rebuttal Panel in July 2011.

14. Nothing was heard from the Applicant until 18 November 2015, when he filed the present Application identifying the contested decision as UNOPS' failure to provide him with a "copy of the Rebuttal Panel's report and the written response to his Rebuttal statement".

15. On 11 December 2015, the Respondent filed his Reply.

16. On 14 December 2015, the Applicant filed a Motion for disclosure of:

- a) his performance appraisal rebuttal panel report with the names of participants and signatories,
- b) minutes of his performance appraisal rebuttal process showing all names of participants and signatories,
- c) a copy of the letter sent to him informing him of the outcome of the rebuttal process and the decision of the UNOPS Executive Director regarding his employment, and
- d) a copy of an anonymous statement submitted by the Respondent on 11 December 2015 showing the names of the person who made the statement.

17. On 21 December 2015, the Tribunal issued Order No. 392 (NBI/2015) granting the Applicant's motion in part. The Tribunal ordered the Respondent to disclose to the Applicant the performance appraisal report and the letter informing

him of the outcome of the process and UNOPS' consequential decision. The Order did not deal with the Applicant's request as set out in paragraph 16(a) and (b) above.

18. On 24 December 2015, the Respondent filed the Applicant's PAR and the communication from the then UNOPS Human Resources Director informing the Applicant that the Executive Director of UNOPS had decided to uphold the Performance Appraisal Rebuttal Panel's recommendation to uphold the Applicant's overall performance rating.

19. In respect of the letter informing him of the Executive Director's decision, the Respondent also informed the Tribunal that, on 5 July 2011, prior to completion of the Rebuttal process, the Applicant had informed the then Human Resources Director that he did not wish to have his appointment extended beyond 31 July 2011.

20. On 27 December 2015, the Applicant filed what he referred to as "a statement on the Respondent's Obedience to Court Order No. 392 (NBI/2015) for the Production of Documents". The Applicant pointed out that there was an error in the Tribunal's Order, in that it required disclosure of the performance appraisal report rather than the performance appraisal Rebuttal Panel Report as requested in the Applicant's motion.

21. On 31 December 2015, the Applicant filed a motion for Correction of Court Order No. 392 (NBI/2015), on the ground of error in the Tribunal's Order. This Motion has not, to-date, been ruled upon.

22. On 4 August 2016, the parties were informed that this matter had been transferred to the docket of Judge Goolam Meeran.

23. On 15 August 2016, the Tribunal issued Order No. 414 (NBI/2016) directing the Applicant to respond to the Respondent's arguments and submissions on the receivability of the Application.

24. On 16 August 2016, the Applicant filed a Motion which did not deal with the substance of the Order but requested a response to the Motion he filed on 31

December 2015 to which he said he was awaiting a response. He requested “a waiver of the deadline to respond to” Order No. 414 (NBI/2016) “until Order No. 392 (NBI/2015) is addressed by the Tribunal”.

25. On 22 August 2016, the Tribunal issued Order No. 418 (NBI/2016) exceptionally allowing waiver of the deadline sought by the Applicant and granted him additional time to comply with Order No. 414 (NBI/2016).

26. On the same day, the Applicant filed his submissions in compliance with Order No. 414 (NBI/2016).

27. The Tribunal will now deal with the Applicant’s initial filing on 5 March 2015; and the receivability, and if appropriate, the merits of the Application filed on 18 November 2015. The Tribunal will also decide on the Applicant’s motion to amend the error in Order No. 392 (NBI/2015).

Considerations

28. The Tribunal has identified the following issues to be considered in order to determine if the application is receivable and, if it is, to determine the merits of the claim:

- (a) What is the contested decision?
- (b) If it is a decision which was required to be subject to a request for management evaluation did the Applicant comply with this mandatory requirement?
- (c) If the Applicant did not request management evaluation are there any circumstances under which the Tribunal may lawfully consider the merits of the claim?
- (d) If the claim is not receivable, what, if any, is the appropriate Order for the Tribunal to make in relation to the Applicant’s motion to correct Order No. 392 (NBI/2015)?

29. The Tribunal finds that the contested decision is the refusal of the Respondent to provide him with an unredacted copy of Rebuttal Panel's Report. Leaving aside the question of why the Applicant submitted the request to the Respondent more than three years after his employment with UNOPS had ended, and whether there is any merit to his argument that he came to the Tribunal as soon as he became aware of irregular conduct by the Respondent in the Rebuttal process, the Tribunal is satisfied that the Applicant was required to submit a request for management evaluation. He did not do so.

30. Staff rules 11.2(a) and (c) and 11.4¹ require a staff member to first approach the Secretary-General for the resolution of a dispute within sixty (60) days of being notified of the impugned decision. That is the threshold of receivability before the Management Evaluation Unit.

31. The threshold for receivability before this Tribunal is governed by articles 7 and 35 of the Rules of Procedure. Art. 7.1 provides (emphasis added):

Applications shall be submitted to the Dispute Tribunal through the Registrar within:

(a) *90 calendar days of the receipt by the applicant of the management evaluation, as appropriate;*

(b) *90 calendar days of the relevant deadline for the communication of a response to a management evaluation, namely, 30 calendar days for disputes arising at Headquarters and 45 calendar days for disputes arising at other offices; or*

(c) 90 calendar days of the receipt by the applicant of the administrative decision in cases where a management evaluation of the contested decision is not required.

32. Subject to art. 8.3 of the Statute, art. 35 further affords the Tribunal (President, or judge or panel hearing a case) the authority to "shorten or extend a time limit fixed by the rules of procedure or waive any rule when the interests of justice so require".

33. Under art. 7.5 of its Rules of Procedure, the Tribunal has power to waive time limits.

¹ ST/SGB/2014/1 (Staff Rules and Staff Regulations of the United Nations).

34. It is settled law that there is no power to waive the deadlines for requesting management evaluation.² Further, where a request for management evaluation is a mandatory first step in commencing proceedings, the Tribunal has no power to dispense with this requirement. As a former staff member, the Applicant may bring a claim before the Tribunal but since he has not provided evidence that he requested management evaluation of his complaint, his claim must fail at the first hurdle.

35. It is the view of the Tribunal that the wide discretion to order disclosure under its case management powers is subject to the principles of relevance and the probative value of the documents sought to be disclosed. This presupposes the pre-existence of a valid claim or a new claim which on the face of it appears that it does or may support the criteria of relevance and probative value. Accordingly a claim which, taken at its highest and giving the party seeking disclosure the benefit of any doubt, discloses no arguable cause of action, cannot support an order for disclosure.

36. The Tribunal accepts that the Applicant was entitled to a prompt response to his motion filed on 31 December 2015 to address the Tribunal's error in identifying the documents in respect of which the Applicant sought disclosure, as a result of which an order was made for disclosure of the wrong document.

37. Notwithstanding the error in Order No. 392 (NBI/2015), the Tribunal finds that granting the motion for an amendment to Order No. 392 (NBI/2015) at this stage of the proceedings would be inappropriate given the Tribunal's finding that the claim is not receivable.

38. Given the Tribunal's finding that the claim is not receivable because of the Applicant's failure to request management evaluation, the Tribunal will not deal with the merits or otherwise of the respective contentions of the parties save to draw their attention to ST/AI/2010/5 (Performance Management and Development System), and in particular paragraph 15.4.

² See *Costa* 2010-UNAT-036; *Trajanovska* 2010-UNAT-074; *Sethia* 2010-UNAT-079; *Ajdini et al.* 2011-UNAT-108.

Judgment

39. The claim is not receivable and is dismissed in its entirety.

(Signed)
Judge Goolam Meeran

Dated this 15th day of September 2016

Entered in the Register on this 15th day of September 2016

(Signed)

Abena Kwakye-Berko, Registrar, Nairobi