



Before: Judge Ebrahim-Carstens

Registry: New York

Registrar: Hafida Lahiouel

KALASHNIK

v.

SECRETARY-GENERAL
OF THE UNITED NATIONS

JUDGMENT

ON RECEIVABILITY

Counsel for Applicant:

Self-represented

Counsel for Respondent:

Alan Gutman, ALS/OHRM, UN Secretariat

Alister Cumming, ALS/OHRM, UN Secretariat

Introduction

1. By application dated 17 June 2016, the Applicant, an Investigator at the P-3 level step 14 in the Investigations Division, Office of Internal Oversight Services (“OIOS”), filed an application contesting, *inter alia*:

a. Multiple failures/omissions to act by the [Under-Secretary-General for Management (“USG/DM”)] and/or any other competent/authorized official involved with staff’s management evaluation requests in order to ensure that:

- the staff member’s request for management evaluation of all OIOS USG’s decisions to cancel recruitments for P-4 New York ID RAU Chief ([Management Evaluation Unit, “MEU”]/795/12/) and P-4 New York Investigator (MEU/643/13) have been considered fully and fairly and have been completed;
- the impugned decisions have been rescinded;
- the staff member concerned has been made whole;
- the staff member concerned has been provided with written and reasoned responses setting out the basis for the management evaluation, including a summary of the relevant facts of the requests and the comments on the request provided by the decision-maker (s), the relevant internal rules of the organization, relevant jurisprudence of the Tribunals, and the decision of the Secretary-General;
- the conclusion of the respective management evaluation processes has been communicated via provision of the written and reasoned responses-“ an important means of displaying the fairness in establishing the credibility of the process.”

b. Multiple decisions by the [USG/DM] and/or any other competent/authorized official not to enforce accountability and not to act in order to protect and/or cover up for the USG for OIOS.

c. Multiple decisions by the [USG/DM] and/or any other competent/authorized official not to hold the USG for OIOS accountable for her actions.

d. Multiple decisions by the [USG/DM] and/or any other competent authorized official to promote the culture of lawlessness

and unaccountability and lack of integrity among OIOS senior management by failing to take appropriate action.

2. Essentially, the Applicant alleges that his rights to request management evaluation, and to a full, fair and timely consideration of such requests in order to correct unlawful decisions in an efficient and timely manner, have been infringed by the conduct and/or inaction of the MEU and the Administration, in its multiple failures and omissions to take appropriate action to enforce compliance and accountability. As relief, the Applicant seeks, *inter alia*: correction of the irregular conduct; a referral to the Secretary-General for accountability of individuals; compensation for the breach of the Applicant's rights due to the repeated failure of officials to comply with their obligations; and referral to the General Assembly to have "the MEU removed as a mandatory step" due to its failure to serve the intended objectives under the new system of administration of justice.

3. In the reply, duly filed on 20 July 2016, the Respondent contends that the application is not receivable *ratione materiae* because the Applicant has failed to contest an appealable administrative decision under art. 2.1(a) of the Tribunal's Statute. Furthermore, the Respondent submits that the application is time-barred and not receivable *ratione temporis* as the Applicant's request of 4 April 2016 for management evaluation merely repeats the contents of a previous management evaluation request submitted on 11 January 2016, a response to which was provided on 5 February 2016. Therefore, the Applicant should have filed his application with the Tribunal within 90 days thereof, pursuant to staff rule 11.4(a), that is by 5 May 2016. The MEU is now *functus officio*, and the Applicant may not attempt to reset the deadline to file a case before the Dispute Tribunal by making a new request for management evaluation. The Respondent reserves the right to file a defense on the merits, pending the identification of an administrative decision falling within the competence of the Tribunal.

4. By Order No. 180 (NY/2016) dated 25 July 2016, the Tribunal ordered the Applicant to file a submission addressing the issues of receivability raised in the Respondent's reply by 22 August 2016 and informed the parties that it would proceed to consider these matters on the papers as a preliminary issue, unless otherwise further directed.

5. On 18 August 2016, by regular email, the Applicant requested, due to personal reasons, a temporary suspension of the proceedings.

6. By Order No. 203 (NY/2016) dated 19 August 2016, the Tribunal granted the suspension of the proceedings requested by the Applicant and ordered him to file a submission addressing the issues of receivability raised in the Respondent's reply on or before 26 September 2016.

7. On 26 September 2016, the Applicant filed his response as per Order No. 203 (NY/2016).

8. By Order No. 7 (NY/2017) dated 11 January 2017, the Tribunal instructed the parties that, as a preliminary issue, it would proceed to consider the question of the receivability of the application on the papers before it.

Factual background

9. It appears from the management evaluation letter dated 5 February 2016 (submitted in evidence by the Applicant) that, on 5 December 2012 and 28 June 2013, respectively, the Applicant filed two requests for management evaluation contesting the cancellation of selection exercises for two P-4 level investigator posts, to which he contends he received no response. In his application, the Applicant states the facts regarding his follow-up of these management evaluations in November 2015 as follows:

... On 8 February 2016, in connection with a separate January 2016 management evaluation request challenging the USG for DM's refusal to release to the Applicant management evaluations of OIOS USG's decisions to cancel recruitments for P-4 New York ID RAU Chief (MEU/795112) and P-4 New York Investigator (MEU/643113), the MEU was compelled to reveal that the evaluations into both cases were never completed.

... The same day, the MEU was requested to provide, by 15 February 2016, the names of the individuals who made the decisions to not complete the evaluations in question.

... On 4 April 2016, with no reply from the MEU, a mandatory management evaluation was filed. The April 2016 submission challenged, based on the information provided by the MEU in February 2016, the repeat decisions by undisclosed staff within the MEU, Office of the USG for DM, and/or by the USG for DM to not complete assessments of the conduct by the USG for OIOS, who was found to have abused her authority by an independent Panel established by the Secretary General.

... On 22 April 22, the MEU advised that the 4 April 2016 request was non-receivable.

Consideration

10. The Respondent contends that the application is not receivable *ratione materiae* because the Secretary-General's response to a request for management evaluation does not constitute an appealable administrative decision under art. 2.1(a) of the Tribunal's Statute and that the Dispute Tribunal may only review the underlying administrative decision that is the subject of an applicant's request for management evaluation. In support of his claim, the Respondent, *inter alia*, refers to the following judgments of the Dispute Tribunal: *Kalashnik* UNDT/2015/087, *Staedler* UNDT/2014/046, and *Hassanin* UNDT/2014/006.

11. In response, the Applicant submits that the circumstances of the present case are materially different and distinguishable from those of *Kalashnik*, *Staedler*, and *Hassanin* in that, in the present case, the Applicant does not, and cannot, challenge

any recommendations of the MEU as no such recommendations ever existed. In his application, the Applicant is seeking a judicial review of the Administration's repeated failure to act on his management evaluation requests without regard to the outcome of the process. The Applicant submits that the same MEU staff members have repeatedly failed to provide such responses to his management evaluation requests regarding some decisions of a former USG/OIOS. These MEU staff members therefore acted negligently and/or colluded to protect the said USG/OIOS. As a legal basis for his claim, the Applicant refers to the General Assembly resolution 61/261 (Administration of justice at the United Nations), by which the United Nations internal justice system was established, including the MEU, as well as the adoption of staff regulation 11.1 and staff rule 11.2.

12. The Tribunal notes that the Appeal Tribunal has consistently held that it is for the Applicant to identify an administrative decision capable of being reviewed (see, for instance, *Planas* 2010-UNAT-049 and *Reid* 2014-UNAT-419). In this regard, the Appeal Tribunal has further held that, when determining the impugned decisions, and thereby defining the key issues and scope of the case, the Dispute Tribunal is not limited to the staff member's description of the contested or impugned decision, but "quite properly, it could consider the application as a whole, including the relief or remedies requested by the staff member, in determining the contested or impugned decisions to be reviewed" (see *Chaaban* 2016-UNAT-611, para. 18).

13. In the present case, the Applicant describes the contested decisions as follows (in a summarized form):

Multiple failures/omissions to act by [the USG/DM] and/or any other competent/authorized official ... involved with staff's management evaluation requests ... not to enforce accountability and not to act in order to protect and/or cover up for the USG for OIOS ... not to hold the USG for OIOS accountable for her actions ... to promote the culture of lawlessness and unaccountability and lack of integrity among OIOS senior management by failing to take appropriate action.

14. It could therefore be considered that the Applicant is appealing a range of different “failures/omissions by [the USG/DM] and/or any other competent/authorized official involved with staff’s management evaluation requests”. However, when closely perusing the Applicant’s outline of facts, his grounds of appeal and his additional contentions on receivability contained in his 26 September 2016 submission, it is clear that the crux of his case turns on the issue of the MEU’s alleged failure, or omission, to respond to his requests for additional information and management evaluation, and the alleged inaction of other higher competent officials involved in the management evaluation process.

15. Furthermore, on the information available to the Tribunal, it is noted that the Applicant has not filed any application challenging any of the administrative decisions in connection with the relevant management evaluation processes, notably the “OIOS USG’s decisions to cancel recruitments for P-4 New York ID RAU Chief (MEU/795112) and P-4 New York Investigator (MEU/643113)”.

16. As consistently held by the Dispute and Appeals Tribunals, the Tribunals are not to separately adjudicate upon the response to an applicant’s request for management evaluation but rather to review the underlying administrative decision. For instance, in *Kalashnik* UNDT/2015/087, the application was dismissed as not receivable because the Tribunal found, in para. 12 that,

... It is settled law that the contested decision which may be reviewed by the Dispute Tribunal is not the decision of the MEU, but the administrative decision that is alleged to be in non-compliance with the terms of appointment or the contract of employment of the staff member. ...

17. In *Kalashnik* 2016-UNAT-661, the Appeals Tribunal upheld *Kalashnik* UNDT/2015/087, holding in paras. 25 to 32 that (emphasis added and references to footnotes omitted):

... The Appeals Tribunal has “consistently held that the key characteristic of an administrative decision subject to judicial review is that the decision must ‘produce[] direct legal consequences’ affecting a staff member’s terms and conditions of appointment; the administrative decision must ‘have a direct impact on the terms of appointment or contract of employment of the individual staff member’”. [reference to footnote omitted] Further, a reviewing tribunal should consider “the nature of the decision, the legal framework under which the decision was made, and the consequences of the decision” in determining whether an application challenges an administrative decision which is subject to judicial review.

... Management evaluation is a vital component of our system for the administration of justice. As we have commented, “the purpose of management evaluation is to afford the Administration the opportunity to correct any errors in an administrative decision so that judicial review of the administrative decision is not necessary ...”.

... To assure that the Administration has the opportunity to correct any errors before litigation is brought, Article 8(1)(c) of the [Dispute Tribunal, “UNDT”] Statute provides that “[a]n application shall be receivable if ... [a]n applicant has previously submitted the contested administrative decision for management evaluation, where required”.

... *However, Article 8 does not require that the Administration respond to the request for management evaluation in order for an application to be received by the UNDT. To the contrary, pursuant to Article 8(1)(d)(i)(b) of the UNDT Statute, an application shall be received by the UNDT despite the failure of the Administration to respond: “An application shall be receivable if ... [t]he application is filed ... [w]ithin 90 calendar days of the expiry of the relevant response period for the management evaluation if no response to the request was provided”.*

... *Accordingly, it is fair to say that the General Assembly when enacting the provisions of the UNDT Statute did not consider the Administration’s response to a request for management evaluation to be a decision that “produced direct legal consequences” affecting a staff member’s terms and conditions of appointment. To the contrary, as discussed above, “the nature of the decision, the legal framework under which the decision was made, and the consequences of the decision” all support the conclusion that the Administration’s response to a request for management evaluation is not a reviewable decision. The response is an opportunity for the Administration to*

resolve a staff member's grievance without litigation – not a fresh decision.

... If the decision itself cannot be subject to judicial review, then the procedures utilized by the Administration in reaching the decision also cannot be subject to judicial review. Mr. Kalashnik cannot create a right to challenge the Administration's procedures for responding to requests for management evaluation when that right does not exist in the Staff Rules or elsewhere. Management has discretion in how to consider and respond to staff members' requests for evaluation; the discretion is not subject to micro-managing by the staff members. In fact, as discussed, management may choose not to respond at all.

... “The role of the Dispute Tribunal includes adequately interpreting and comprehending the application submitted by the moving party, whatever name the party attaches to the document.” In addition to finding the application was not receivable *ratione materiae*, the UNDT alternatively found that the application challenged “precisely the same job openings/administrative decisions” Mr. Kalashnik challenged under Case No. UNDT/NY/2015/031.12 This alternative ground is supported by the record, and the UNDT did not err in fact or law in reaching this conclusion.

... As the Appeals Tribunal has concluded that the UNDT did not err in law or fact when it refused to receive the application, the UNDT Judgment on Receivability should be affirmed, and the appeal denied.

18. Under the former system of administration of justice, before initiating an appeal, a staff member had to seek a review of the administrative decision, a process that normally took 60 days. The Redesign Panel recommended that this system of administrative review before action be abolished, having identified it as one of the factors causing egregious delays in the proceedings before the former Joint Appeals Boards (see paras. 66 and 87 of A/61/205 (Report of the Redesign Panel on the United Nations system of administration of justice), dated 20 July 2006). It is instructive that the General Assembly thereafter adopted the current system of management evaluation with strict deadlines in the Statute of the Dispute Tribunal.

19. Under the internal justice system of the United Nations, management evaluation is an administrative process, which is primarily intended to afford the

Administration the earliest opportunity to reconsider and remedy a situation in which an administrative decision has been challenged to avoid litigation (see, for instance, *Applicant* 2013-UNAT-381, *Kuadio* 2015-UNAT-558, *El-Shobaky* 2015-UNAT-564, *Nagayoshi* 2015-UNAT-498 and *Nwuke* 2016-UNAT-697). Whilst ordinarily, with a few exceptions, submission to management evaluation is a necessary requirement for having a case determined by the Dispute Tribunal, awaiting the receipt of MEU's response beyond the requisite time period is not. If the MEU fails to deliver a management evaluation within the prescribed period, by default, as the time for management evaluation may generally not be extended, the original administrative decision stands as adopted by the Respondent, which remains as the contestable decision.

20. Management evaluation is therefore an opportunity for the Administration to correct an administrative decision, including an implied administrative decision, such as a non-response or an omission, so as to avoid judicial review. Whilst a staff member is enjoined to file a request for management evaluation, there is no commensurate responsibility for the administration to respond. The Administration's response, or lack thereof, to a request for management evaluation is not a reviewable decision. Furthermore, if the decision itself cannot be subject to judicial review, then the procedures utilized by the Administration in reaching or not reaching a decision also cannot be subject to judicial review. In light hereof, the application is therefore not receivable.

21. Whilst the Tribunal understands the frustrations that may be felt by a staff member by untimely delays in MEU responses or the lack thereof, which may prejudice the timely correction of unlawful decisions, a staff member is enjoined to file an application contesting a contestable administrative decision.

22. In light of the conclusion and findings herein, the Tribunal need not therefore consider whether the application is time-barred or receivable *ratione temporis*.

Conclusion

23. In all the above circumstances, the Tribunal finds that the application is not receivable.

24. Accordingly, the application is dismissed.

Signed

Judge Ebrahim-Carstens

Dated this 26th day of April 2017

Entered in the Register on this 26th day of April 2017

Signed

Hafida Lahiouel, Registrar, New York